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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 63

HERMAN A. BEILAN, PETITIONER,

vs.

BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA, EASTERN DISTRICT.

PETITION FOR CERTIORARI FILED DECEMBER 31, 1956
CERTIORARI GRANTED MAY 20, 1957

No. 97. **January Term, 1956.**

IN THE

Supreme Court of Pennsylvania

EASTERN DISTRICT.

BOARD OF PUBLIC EDUCATION
SCHOOL DISTRICT OF PHILADELPHIA,
Appellant,

v.

HERMAN A. BEILAN.

Appeal from the Judgment of the Court of Common Pleas No. 6 of the County of Philadelphia, December Term 1954, No. 4742.

RECORD.

SIDNEY L. WICKENHAVER,
C. BREWSTER RHOADS,
1421 Chestnut Street,
Philadelphia 2, Pa.,
EDWARD B. SOKEN,
21st Street and The Parkway,
Philadelphia 3, Pa.,
Attorneys for Appellant.

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RELEVANT DOCKET ENTRIES.

January 17, 1955. Appeal from the Superintendent of Public Instruction of Commonwealth of Pennsylvania filed.

January 17, 1955. Appellant's exceptions to Adjudication of the Superintendent of Public Instruction filed.

January 17, 1955. Writ of Certiorari Exit. Ret. Sec. Leg.

March 14, 1955. Recorded return to office filed.

October 20, 1955. The appeal of Herman A. Beilan is hereby sustained; the action of the Superintendent of Public Instruction in affirming the Board of Education's dismissal of the said Herman A. Beilan is reversed; and the discharge of said Herman A. Beilan is set aside.

Eo die. Opinion filed: (Curtis Bok) P. J. (Gerald F. Flood) J. (Louis E. Levinthal) J.

October 27, 1955. Certiorari from Supreme Court as of January Term, 1956 #97 brought into office and filed. Board of Education School District of Philadelphia, appellant.

RESOLUTION OF THE BOARD OF PUBLIC EDUCATION.

WHEREAS, written charges under the Act of March 10, 1949, P. L. 30, Section 1122, as amended, have been made by the Superintendent of Schools, Dr. Louis P. Hoyer, against Herman Beilan, a professional employe, of incompetency and persistent and wilful violation of the school laws of this Commonwealth, a copy of which charges is as follows:

On June 25, 1952, Dr. Louis P. Hoyer, Superintendent of Schools, informed you during a personal interview that he wished to ask you some questions having an important bearing on your loyalty. Dr. Hoyer then asked you whether in 1944 you were press director of the professional section of the Communist Political Association. You said you wanted advice of counsel and would call Dr. Hoyer to arrange for a further appointment.

On October 14, 1952, at the second interview, you said you had obtained advice of counsel who said you could not legally be asked questions about political and religious beliefs and that there was no legal basis for asking these questions.

You refused to answer questions as to your affiliations when asked by the Sub-Committee of the House Committee on Un-American Activities, on Wednesday, November 18, 1953, and you invoked the Fifth Amendment of the Federal constitution as the basis of your refusal.

In refusing to answer the questions of Dr. Louis P. Hoyer, you failed in your duty to cooperate with the Superintendent of Schools in the performance of his official duties as your administrative superior. The Superintendent of Schools was trying to discuss with you matters directly affecting your professional fitness

to be a teacher in the Philadelphia public schools. If the information in Dr. Hoyer's possession was true it created a serious doubt as to whether you could continue the duties of a public school teacher. The purpose of the interview was to help the Superintendent resolve this doubt. No professional employe has the legal right to impede the Superintendent of Schools in the performance of his duties. It is inconsistent with your civic responsibility to refuse to answer questions relating to your loyalty when the purpose of the questions was to determine your fitness to continue to be a public school teacher.

You failed in your duty to cooperate with a properly constituted Sub-Committee of the House of Representatives of the United States of America. Instead of performing your duty toward this Sub-Committee as every citizen should have done in similar circumstances you invoked the Fifth Amendment as the basis of your refusal to cooperate.

Your conduct shows you are incompetent and are guilty of wilful and persistent violation of the school laws, and

WHEREAS, the said Superintendent of Schools has recommended the dismissal of the said professional employe, therefore be it

RESOLVED, That the Board of Public Education hereby prefers charges against the said Herman Beilan of incompetency and persistent and wilful violation of the school laws of this Commonwealth in violation of the Act of March 10, 1949, P. L. 30, based on the written charges of the Superintendent of Schools, and

FURTHER RESOLVED, That a written notice signed by the President and attested by the Secretary of The Board of Public Education be forwarded by registered mail to aforesaid professional employe setting forth a

detailed statement of the charges and the information that a full hearing on the charges will take place not less than 10 days nor more than 15 days after such notice, at which hearing the employe will be given an opportunity to be heard either in person or by counsel, or both.

Mr. Obermayer moved the adoption of the resolutions.

On the adoption of the resolutions, the yeas and nays were called and were as follows:

YEAS: Mr. Downs, Mr. FitzPatrick, Miss Golden, Mr. Greenberg, Mr. LaBrum, Mrs. Lewis, Mr. Loesche, Dr. Lucchesi, Mr. McDonough, Mr. Obermayer, Dr. Pollock, Mr. Swenson, Dr. Turner, Mr. Weinrott, Mr. Saul, *President*—15.

NAYS: None.

The resolutions were adopted.

HEARING BEFORE BOARD OF EDUCATION.

Philadelphia, Pa., December 22, 1953.

Hearing in the above matter held this date before the Board of Public Education pursuant to the Act of March 10, 1949, P. L. 30, Section 1122, as amended, in the Board Room of the Administration Building of the Board of Public Education, 21st and Parkway, Philadelphia, Pennsylvania.

Present:

WALTER BIDDLE SAUL, Pres.	WILLIAM H. LOESCHE
W. FINDLAY DOWNS	JOSEPH A. McDONOUGH
A. L. FITZPATRICK	LEON J. OBERMAYER
GERTRUDE A. GOLDEN	ROBERT BLAIR POLLOCK
JOSEPH J. GREENBERG	ALVIN A. SWENSON
J. HARRY LABRUM	JOHN P. TURNER
MRS. JOHN F. LEWIS, JR.	LEO WEINROTT

ADD B. ANDERSON, Secretary and Business Manager

C. BREWSTER RHOADS and

EDWARD B. SOKEN, Counsel for the Board

JOHN ROGERS CARROLL, Counsel for Herman Aaron Beilan

HERMAN AARON BEILAN, A Professional Employee

MR. SAUL: The meeting will come to order. The Secretary will read the call for the meeting.

MR. ANDERSON: Communication signed by the President, addressed to the Secretary.

Dear Mr. Anderson: Will you call a special meeting of the Board of Public Education for Tuesday, December 22, 1953 at 1:30 P. M. to hear

the charges against Bernard August and Herman Beilan? Sincerely yours, signed by the President.

MR. SAUL: The Secretary will call the roll.

(The Secretary called the roll and those members previously listed as being present responded to their names.)

MR. SAUL: We will proceed with the hearing. The Secretary will read the resolution under which the hearing is to be held.

MR. ANDERSON: Whereas, written charges under the Act of March 10, 1949, P. L. 30, Section 1122, as amended, have been made by the Superintendent of Schools, Dr. Louis P. Hoyer, against Herman Beilan, a professional employee, of incompetency and persistent and wilful violation of the school laws of this Commonwealth, a copy of which charges is as follows:

On June 25, 1952, Dr. Louis P. Hoyer, Superintendent of Schools, informed you during a personal interview that he wished to ask you some questions having an important bearing on your loyalty. Dr. Hoyer then asked you whether in 1944 you were press director of the professional section of the Communist Political Association. You said you wanted advice of counsel and would call Dr. Hoyer to arrange for a further appointment.

On October 14, 1952, at the second interview, you said you had obtained advice of counsel who said you would not legally be asked questions about political and religious beliefs and that there was no legal basis for asking these questions.

You refused to answer questions as to your affiliations when asked by the Sub-Committee of

the House Committee on Un-American Activities, on Wednesday, November 18, 1953, and you invoked the Fifth Amendment of the Federal Constitution as the basis of your refusal.

In refusing to answer the questions of Dr. Louis P. Hoyer, you failed in your duty to cooperate with the Superintendent of Schools in the performance of his official duties as your administrative superior. The Superintendent of Schools was trying to discuss with you matters directly affecting your professional fitness to be a teacher in the Philadelphia public schools. If the information in Dr. Hoyer's possession was true it created a serious doubt as to whether you could continue the duties of a public school teacher. The purpose of the interview was to help the Superintendent resolve this doubt. No professional employee has the legal right to impede the Superintendent of Schools in the performance of his duties. It is inconsistent with your civic responsibility to refuse to answer questions relating to your loyalty when the purpose of the questions was to determine your fitness to continue to be a public school teacher.

You failed in your duty to cooperate with a properly constituted Sub-Committee of the House of Representatives of the United States of America. Instead of performing your duty toward this Sub-Committee as every citizen should have done in similar circumstances you invoked the Fifth Amendment as the basis of your refusal to cooperate.

Your conduct shows you are incompetent and are guilty of wilful and persistent violation of the school laws, and

Whereas, the said Superintendent of Schools has recommended the dismissal of the said Professional employee, therefore be it

Resolved, that The Board of Public Education hereby prefers charges against the said Herman Beilan of incompetency and persistent and wilful violation of the school laws of this Commonwealth in violation of the Act of March 10, 1949, P. L. 30, based on the written charges of the Superintendent of Schools, and

Further Resolved, that a written notice signed by the President and attested by the Secretary of The Board of Public Education be forward by registered mail to aforesaid professional employee setting forth a detailed statement of the charges and the information that a full hearing on the charges will take place not less than 10 days nor more than 15 days after such notice, at which hearing the employee will be given an opportunity to be heard either in person or by counsel, or both.

MR. SAUL: Before we start with the testimony I would like Mr. Rhoads, if he will, to call attention to the sections of the Code referred to. I understand that Section 1122 of the Code, providing for causes for termination of contract, is the basis for the charge of incompetency. Is that correct, Mr. Rhoads?

MR. RHOADS: That is correct, Mr. President.

MR. SAUL: The other charge is wilful and persistent violation of the School Laws of the Commonwealth. Will you point out to the Board, please, which sections of the School Code or the laws that you believe have been violated?

MR. RHOADS: Mr. President, I think I have made myself clear on prior occasions. I do not, in consider-

ing the charge of wilful and persistent violation of the school laws of this Commonwealth, refer to any specific section of the School Code.

It is the thought of your counsel that the chief charge here revolves around Section 1122, as I have suggested. And the question for ultimate interpretation of the court, it seems to me, is whether the conduct of these respondents or this respondent constitutes incompetency within the specific Section 1122, and whether the other conduct or the sum total of the conduct which will be demonstrated constitutes a generalized violation of the School Code under the wilful and persistent violation terms.

MR. SAUL: But there is no section of the law to which you can point to say that is the section that has been violated?

MR. RHOADS: Under the wilful and persistent violation of the School Code provision, yes, sir, there is none.

My thinking, Mr. President, is that the wilful and persistent violation of the School Code is something that depends upon the interpretation by the court of the facts of a given case. I think when the facts of this case are considered by this Board or by the courts, it will be developed and will be found to be the law, that there has resulted from those acts a wilful and persistent violation.

MR. SAUL: There is one other thing that I would like to have clear.

MR. RHOADS: I think that that is the only way I can answer you, Mr. President.

MR. SAUL: Well, that is perfectly clear. The School Code beginning with Section 3307——

MR. WEINROTT: Well, may we take a look at 3307 while we are talking about it? I would like to know what we are talking about.

MR. OBERMAYER: Mr. Saul is talking about the Pechan——

MR. DOWNS: Mr. President, aren't we here to hear the testimony of this witness and not discuss any matters you are bringing up?

MR. SAUL: That is correct. But I think it would be helpful to the Board to have in mind the sections of the School Code under which the hearing is proceeding, and to eliminate such provisions that, as I understand, counsel say are not involved. But I think it should clearly appear on the record they are not involved.

MR. RHOADS: Mr. President, I am not prepared to argue the legal phases of that particular issue at this minute, and I don't propose that this record shall show that that is the fact unless you, Mr. President, insist on it, which I don't believe you will. It seems to me, sir, that that is an issue that is clearly within the realm of what I would call discussion between counsel and this Board in what I might term executive session.

MR. DOWNS: Exactly.

MR. RHOADS: And I have endeavored to explain, in what I might call broad brush strokes, what the thoughts of your counsel, and I believe the Board, have been in prefering these charges. But I do not think that this is an appropriate time in which, shall we say, the legal features of this particular situation shall be pinpointed by virtue of a colloquy between the Board and counsel, if I may use that expression.

MR. SAUL: Speaking both as a member of the Board and as a lawyer, from whatever decision this

Board makes there is an appeal first to the State Superintendent of Public Instruction and from his decision to the courts.

MR. RHOADS: That is my understanding, sir.

MR. SAUL: And the record that we make here will go to the court. I think that it is entirely proper that this record should show whether or not this Board, in making its decision, has considered the provisions of the Code beginning with Section 3307, which are the provisions having to do with questions that arise as to the loyalty of a teacher. I think it is only fair for that matter to be clear when the appeal is made to the court, if one is made.

MR. WEINROTT: Mr. President——

MR. RHOADS: May I answer and then be done? It is my contention, and it has been the thought of your counsel since these proceedings were initiated, that these are not proceedings brought against these respondents charging them with disloyalty. If that were the situation we would have a completely different record, a completely different set of facts, a completely different section under which the charges would be made, if made at all.

The charge which I understood the Board is making in these cases, and which I purpose to present, is a charge based upon two things and two things only, namely, that in June or in the year of 1952 the Superintendent of Schools of your School Board called upon this respondent to answer certain questions which he believed pertinent. They happen to be questions regarding his loyalty. But whether they were questions of any other character, the same situation would have developed if they had been pertinent questions. Those questions were not answered for the reasons with which you are familiar in the charges.

I then purpose to show, and there is a limitation to these charges, that on November 18, 1953 or thereabouts, this respondent, pursuant to a subpoena from the Un-American Activities Committee, appeared here in Philadelphia, was given an opportunity to testify as to certain things which that Committee, a committee of Congress, believed to be pertinent; that he refused, and that he refused not only bluntly, but he claimed the benefit of the Fifth Amendment of the Constitution of the United States. And it is our contention in connection with that second clause or charge of these charges, or count of these charges, that that fact and the prior fact of his refusal to cooperate in a matter of professional concern with the Superintendent of Schools of this School Board or this School District, constitutes incompetency.

Now, so far as I am concerned, sir, and so far as my presentation of testimony is concerned, I don't think whether this man is loyal or disloyal has anything to do with this case. And if your counsel's advice were being asked in the matter, I should say that any testimony directed toward present loyalty or disloyalty is completely out of this case.

MR. SAUL: Present or past loyalty, I take it.

MR. RHOADS: So far as this case is concerned, we are not delving into present or past loyalty.

MR. SAUL: You are not asking this Board in the presentation of these charges—you are not asking this Board to pass on the question of the loyalty of this teacher?

MR. RHOADS: I am not asking this Board in this proceeding or any other proceeding that I know of to pass upon the loyalty or disloyalty of this particular teacher. I am saying that the things which this teacher

did in connection with his professional obligations were such as to result in incompetency sufficient to discharge the teacher under the School Code.

MR. SAUL: And are you saying to the Board now that in making our decision we are not to be influenced by any thoughts or any ideas that we have as to loyalty or disloyalty?

MR. RHOADS: I can't say what thoughts are going to influence you, Mr. President, or anybody. I am saying that these charges are not directed toward loyalty, and beyond that I couldn't go. I couldn't possibly answer your question.

MR. WEINROTT: I wonder whether Mr. Rhoads is on trial here or something?

MR. OBERMAYER: Mr. Rhoads, when you use the word loyalty, you are, of course, talking about loyalty to the United States Government, not loyalty to the School System?

MR. RHOADS: By all means.

MR. OBERMAYER: I just wanted to get that clear.

MR. RHOADS: I am so glad you corrected me, because, of course, if Mr. Saul has used the word loyalty in connection with the generic use of that word——

MR. SAUL: No, I did not.

MR. RHOADS: I didn't think you did.

MR. SAUL: I think the situation is clear. We will proceed with the taking of the testimony.

MR. WEINROTT: Well, Mr. Saul, may I point out, because I am getting a little bit disturbed and I want to be undisturbed, these charges were voted by all fifteen members of the Board of Public Education, and you participated in that, too.

MR. SAUL: That is correct.

MR. WEINROTT: And I understand the charges as they are outlined here, presented to us today by a unanimous vote of all of us, are the only charges that are being tried here in accordance with what Mr. Rhoads has already indicated. That is as I understand it.

MR. SAUL: I think your understanding is correct.

MR. RHOADS: May I call, if the Board pleases, Dr. Hoyer as our first witness, and ask that he be sworn?

DR. LOUIS P. HOYER, having been duly sworn by the President of the Board, was examined and testified as follows:

By MR. RHOADS:

Q. Dr. Hoyer, would you be good enough to give your full name and address?

A. Louis P. Hoyer, 6630 North 10th Street, Philadelphia.

Q. And what is your occupation?

A. I am Superintendent of Public Schools in Philadelphia.

Q. How long have you been Superintendent of Schools?

A. I have been Superintendent of Schools since September 1, 1948.

Q. How long have you been associated with the School System of Philadelphia?

A. I have been associated with the School System of Philadelphia for forty-six years. I am in my forty-seventh year at the present time.

Q. And will you just give us the benefit of a statement of your experience and the positions which you have held in the School System?

A. Well, I have been an elementary school teacher. I have been an elementary school principal. I have been a principal of a continuation school, of two junior high schools. I have been a District Superintendent. I have been an Associate Superintendent. And now I am Superintendent of Schools.

Q. During those years have you participated in the work of the School System both as a teacher and as an administrator?

A. Yes. I have been both a teacher and an administrator.

Q. In connection with your work as Superintendent of Schools is it part of your duties to confer with professional employees of the School System on matters of a professional nature?

A. It is my duty to confer with members of the staff at all levels—teachers, administrators, supervisors. And I do that.

Q. And is it also part of your duties as Superintendent of Schools to consider from time to time the professional fitness and competency of teachers under your general supervision?

A. Yes. It is a duty that devolves upon me not only to determine the qualifications for admission to the School System, but also for retention of positions in the School System.

Q. Dr. Hoyer, do you know Herman Aaron Beilan?

A. Yes, I know him.

Q. How long have you known him?

A. I have known him only since the time he was called into my office for a conference.

Q. Do your records indicate what position he holds presently in the School System?

A. Yes. He is a teacher of English at the Gratz High School at the present time.

Q. How long has Mr. Beilan been in the School System?

A. Well, I would have to consult records to determine that, if that is in order.

Q. You don't happen to have that with you, do you?

A. Yes, I happen to have it with me.

Q. Would you be good enough to tell us?

A. He was appointed to a position as an industrial arts teacher in the Crispin School the 17th of February, 1930.

Q. And has he been continuously in the School System since that time?

A. I would say so. I would have to consult this form to see whether he was in the service or not. But he has been an employee of the System with some possible——

Q. With the exception of any service which he might have had or leaves of absence, he has been continuously in the School System?

A. That is correct.

By Mr. Weinrott:

Q. What was that date?

A. February 17, 1930.

By Mr. Rhoads:

Q. Now, Dr. Hoyer, in the performance of your duties as Superintendent of Schools of the School District of Philadelphia did you request Mr. Beilan to call upon you on June 25, 1952 for an interview in your office?

A. Yes, I did.

Q. What were the circumstances under which you called upon him? Tell us how you notified him, etc.

A. I called him to my office in a letter addressed directly to him.

Q. Have you a copy of that letter with you?

A. I have a copy of that letter.

Q. May I have a copy of that letter?

A. Yes.

MR. RHOADS: Mr. Carroll, have you the original of the letter?

MR. CARROLL: I have it, sir.

By MR. RHOADS:

Q. Dr. Hoyer, I show you the original of a letter dated June 19, 1952, purporting to be signed by Louis P. Hoyer, and addressed to Mr. Herman A. Beilan, and ask you whether that is the letter of notification for the interview.

A. That is the letter.

MR. RHOADS: I ask that the letter which has been produced by Mr. Carroll, counsel for the respondent, be marked as Board's Exhibit No. 1 in this case.

(Letter dated June 19, 1952, was marked for identification as Board's Exhibit No. 1.)

By MR. RHOADS:

Q. As a result of the letter of June 19, 1952, which you sent to Mr. Beilan, did he appear in your office on June 25, 1952?

A. Yes, Mr. Beilan did appear in my office.

Q. Will you tell the Board what your purpose was in calling Mr. Beilan to appear before you for this conference?

A. I had in my possession certain information dealing with Mr. Beilan and about which I wished to

have confirmation or a denial on his part. The material I deemed as so important with regard to possible future usefulness of Mr. Beilan in the School System that I wanted to know whether or not my information was correct. It was important information bearing on his fitness. And it was also important because it came to me from what I considered unimpeachable sources. I wanted to question Mr. Beilan concerning this information.

Q. In general what was the nature of the information? I don't mean anything specific, but to what did it pertain? I refer particularly to your expression fitness.

A. This pertained to Mr. Beilan's association with or membership in various organizations that had been considered subversive organizations. They also indicated a connection with Communist activities.

Q. And did you consider that any possible connection with subversive organizations or Communist activities was such as in your opinion to disqualify a teacher if they be proven true?

A. I considered them to be totally disqualifying to a teacher if they were proven to be true.

Q. And was it for the purpose of securing information from the man concerning whom you had had that information that you called him into your office?

A. I felt that I was giving him an opportunity to assist me in coming to a conclusion with regard to this information that I had. And I asked him to come for that reason.

Q. Is it, therefore, fair to assume that the purpose of your interview was to give Mr. Beilan an opportunity to either deny or agree to certain information which you were going to talk to him about?

A. That is correct.

Q. Was this interview which you had asked Mr. Beilan to attend an interview or a conference which you would consider as of a professional nature?

A. I felt that it was entirely professional because it dealt with what I believed to be qualifications for the position of teacher.

Q. And did you make that purpose clear to Mr. Beilan at the beginning of the conference?

A. I felt that I made it very clear and very evident at the beginning of the conference that this was entirely a professional conference.

Q. Now could you tell us as directly and as accurately as you can what you said to Mr. Beilan and what Mr. Beilan said to you?

A. I indicated to Mr. Beilan that I had some information that I felt bore on the question of his loyalty, and I wanted to know whether the information was correct.

Mr. Beilan wanted me to ask the questions. And I indicated to him that I would be glad to ask him one of the questions and he could then determine whether or not he would answer it and whether he would answer other questions.

Q. And did you ask him a specific question?

A. I asked him one question.

Q. What was that?

A. That question was whether in 1944 he was press director of the professional section of the Communist Political Association.

Q. What reply did he give you to that question?

A. Mr. Beilan did not answer the question. He said he would wish to consult counsel. And I, of course, indicated to him that that was entirely satisfactory to me. So the matter rested there, except that Mr. Beilan wanted to hear the other questions that I

might have asked, but I did not ask any further questions since the first question was not answered.

Q. And was there any indication at the conclusion of your conference that you would be glad to hear from Mr. Beilan again if he so chose to confer with you?

A. Well, I indicated to him that I would want him to come in again when he had had opportunity to consult counsel. And I did ask him to come in for a second conference.

Q. Now, when was that second conference?

A. That second conference was in October. October 14, 1952.

Q. How did that conference happen to occur?

A. That conference happened to occur because I asked Mr. Beilan to come into my office for a further discussion of matters that we had originally discussed.

Q. Was that interview obtained as a result of a letter to Mr. Beilan or a telephone call?

A. No. This was a letter. I have a copy of that letter.

MR. RHOADS: May we have the original, Mr. Carroll, if you don't mind?

MR. CARROLL: I assume that we will be able to get the originals back and you will substitute copies in the record.

MR. RHOADS: Certainly. Mr. Carroll has produced and I now offer in evidence as Board's Exhibit No. 2 in this case a letter of Dr. Louis P. Hoyer to Mr. Herman A. Beilan, dated October 9, 1952.

(Letter dated October 9, 1952, was marked for identification as Board's Exhibit No. 2.)

By MR. RHOADS:

Q. I now ask Dr. Hoyer whether he will identify that as his letter.

A. That is my letter.

Q. And that is the letter, Dr. Hoyer, pursuant to which Mr. Beilan came to your office on October 14, 1952?

A. That is correct.

MR. SAUL: Will you read the letter to the Board?

MR. RHOADS: Yes, sir. I am sorry, Mr. Saul. Dear Mr. Beilan: In order that I may discuss with you further matters already brought to your attention, I should like you to report to this office on Tuesday morning, October 14th, at 10:30 o'clock. Sincerely yours, Louis P. Hoyer, Superintendent of Schools.

Since I did not read the other one, Mr. Saul, may I do so now? This is the June 19 letter.

Dear Mr. Beilan: I should like to see you on a matter of importance at 10:30 o'clock on Wednesday, June 25, in Room 219 of the Administration Building. Sincerely yours, Louis P. Hoyer, Superintendent of Schools.

I am sorry that I did not read them.

By MR. RHOADS:

Q. Mr. Beilan, I believe, reported to you pursuant to your request?

A. He did.

Q. On October 14, 1952; is that right?

A. That is correct.

Q. Will you just tell the Board exactly what occurred? Relate the conversation as specifically as you can, both your questions and Mr. Beilan's answers.

A. Mr. Beilan indicated that he had consulted counsel and he had been advised that he could not legally answer the question that I had asked or questions similar to it.

I indicated to Mr. Beilan on that occasion that this was a very serious and a very important matter and that failure to answer the questions might lead to his dismissal. I wanted to make that clear to Mr. Beilan so that there would be no doubt in his mind as to the importance of this matter as I conceived it; that it wasn't a question of idle curiosity on my part, but that it was a real question of fitness for him to be a teacher or to continue in the teaching work.

I think that is the gist of what happened on that occasion.

Q. May I ask you whether Mr. Beilan answered any of the questions, either the first one or any other questions?

A. There were no questions asked at this conference because of Mr. Beilan's statement that he had consulted counsel and was advised that he could not answer questions of this type.

Q. And you referred particularly to the first question which you had asked him in your earlier interview; is that correct?

A. That is true.

Q. And did you in your interview of October 14, 1952, again ask him the initial question, whether in 1944 he was press director of the professional section of the Communist Political Association?

A. I felt there was no point to asking that question since he had indicated to me that he could not answer questions of that type.

Q. Would you say that Mr. Beilan was cooperative in his attitude in connection with this interview and the prior interview?

A. Well, inasmuch as I was not able to get any assistance from Mr. Beilan in shaping my conclusions with regard to the material I had, I would say that he was totally uncooperative.

Q. Why did you consider it of importance to your duties as Superintendent of Schools to ask questions of the type which you indicated you intended to ask him?

A. I considered it important because it seemed to me that any person identified as the claim was or the information indicated Mr. Beilan was identified, could not be a satisfactory teacher in the School System. And I wanted to know definitely whether or not the facts or the statements that I had were correct. Also the information had come to me from sources that it was utterly impossible for me to ignore. They came from extremely reliable sources. And that lent to the information an aura of probability. I wanted to be sure that that was true.

Q. Now, Dr. Hoyer, do you recall that Mr. Beilan, the respondent in this case, was called before the House Committee on Un-American Activities on November 18, 1953 to testify here in Philadelphia?

A. Yes, I recall that.

Q. Are you familiar with the testimony which he gave before that Committee?

A. I have read the testimony.

Q. I show you, Dr. Hoyer, what purports to be a transcript of the testimony of witnesses appearing before the House Committee on Un-American Activities on November 18, 1953, and refer you particularly to pages 302 to 314 inclusive, and ask you whether or not the transcript which I show you is a transcript of the record which you said you read as you testified a moment ago.

A. Yes, this is the testimony that I read.

MR. RHOADS: Mr. Carroll, I show you a transcript of the testimony and ask you whether there is any question on your part as to whether this is the testimony.

If the Board pleases, may the record show that Mr. Carroll has been good enough to advise me that the transcript which I hold in my hand and from which I will read is a true transcript of the record of Mr. Beilan's testimony before the Committee on November 18, 1953?

MR. SAUL: The record may so show.

MR. RHOADS: And with that kind stipulation I will now offer in evidence and ask that it be marked Board's Exhibit No. 3, the transcript of Mr. Beilan's testimony from page 302 to page 314 inclusive, and I will ask the stenographer to mark it.

(Pages 302 to 314 inclusive of the transcript of testimony were marked for identification as Board's Exhibit No. 3.)

MR. RHOADS: If the Board pleases, I now offer in evidence and will read to the Board the testimony of Herman Beilan before the House Committee on Un-American Activities on November 18, 1953, which is as follows, reading from page 302:—it will be stipulated, Mr. Carroll, that the Herman Beilan referred to here is your client, Herman Aaron Beilan; is that correct?

MR. CARROLL: Correct.

MR. RHOADS: Testimony of Herman Beilan, accompanied by his counsel, W. J. Woolston.

Mr. Kunzig: Would you give your full name, please?

Mr. Beilan: Herman Aaron Beilan.

Mr. Kunzig: Your address, please, sir?

Mr. Beilan: 7641 Thouron Avenue.

Mr. Kunzig: Would counsel please state his name and address for the record?

Mr. Woolston: W. J. Woolston, 1529 Walnut Street, Philadelphia, Pennsylvania.

Mr. Kunzig: Would you give the committee, please, Mr. Beilan, a brief resume of your educational and employment background?

Mr. Beilan: Yes, sir. I graduated from Central High School in the year 1928. I went to the Philadelphia Normal School and graduated in February, 1930.

I was appointed as a teacher two weeks later. I continued my education at Teachers College, from which school I graduated in 1934 with honors.

Since that time I have taken many in-service courses offered by the Board of Education.

My professional record is as follows: I was appointed on February 17, 1930, to the Industrial Arts Class of the Crispin Elementary School. I taught there until September 1, 1933, when I was appointed to the Ferguson School.

In 1940 the Board of Education abandoned the industrial arts program and I was reappointed to the grades in the same school. That was in February, 1940.

In September, 1942, I was transferred to the Blaine School, and in September, 1944, I was appointed to the Barratt Junior High School in the field of general education.

In February, 1947, I was appointed to the senior high school in the field of English and for one-half year, as was the custom at that time, I served as an auxiliary teacher in District 6.

In September of that year I was appointed to Gratz High School, where I am now teaching.

Mr. Kunzig: What do you teach there, Mr. Beilan?

Mr. Beilan: I asked to have the cameras turned off. I respectfully ask again, according to your own rules, that they be turned off.

Mr. Velde: The rule refers to telecast.

Mr. Beilan: One of the cameras has "TV" marked on it.

Mr. Velde: I understand from the technician that it is not running.

Mr. Kunzig: Have you been a director of Sunnyland Day Camp located on Route 309, Montgomery County, near here, a camp for children?

Mr. Beilan: Yes, I have.

Mr. Kunzig: When was that, what year?

Mr. Beilan: 1952 and 1953.

Mr. Kunzig: Mr. Beilan, have you ever been a member of the Communist Party?

Mr. Beilan: I have several reasons for not answering that question. I believe I have the right under the Constitution of the United States not to answer that question, under the Fifth Amendment.

Mr. Kunzig: You refuse to answer under the Fifth Amendment?

Mr. Beilan: That is well stated.

Mr. Kunzig: This Committee is in possession of sworn testimony that you have been a member of the Communist Party and that also in 1943 and 1944 you were a member of the Daily Worker Press Club. Is that correct?

MR. BEILAN: I object to this question because this is cross-examination.

According to your own rules, and I would like to give the number of the rule, Rule 11 in this book that was handed to me, entitled "Rules of Procedure"——

Mr. Kunzig: Would you answer the question, please, Mr. Beilan? Have you been a member during 1943 and 1944 of the Daily Worker Press Club?

Mr. Beilan: I would like a ruling from the Chairman.

Mr. Velde: The committee does not make any rules. Will you proceed to give the information which is being requested of you by counsel?

Mr. Beilan: These rules were handed to me.

Mr. Velde: We are familiar with the rules of this committee. Will you please proceed so that we might have other witnesses before we have to adjourn? Maybe somebody will give us a little information pretty soon.

Mr. Beilan: I want to register an objection. Now, will you please repeat the question?

Mr. Kunzig: Mr. Reporter, would you read back the question to the witness?

(Whereupon, the following question was read:

"This committee is in possession of sworn testimony that you have been a member of the Communist Party and that also in 1943 and 1944 you were a member of the Daily Worker Press Club. Is that correct?")

Mr. Beilan: I invoke the privileges of the Fifth Amendment.

Mr. Kunzig: In 1944 were you press director of the Professional Section of Section 8 of the Communist Political Association, as has been testified to under oath before this committee?

Mr. Beilan: Same answer, same reason.

Mr. Kunzig: Now, in 1945 were you secretary of Section 8 of the Communist Political Association, as has been testified to before this Committee under oath?

Mr. Beilan: Same answer, same reason.

Mr. Kunzig: We also have, under oath, testimony that in 1944——

Mr. Beilan: Excuse me while I consult with my counsel.

(At this point Mr. Beilan conferred with Mr. Woolston.)

Mr. Kunzig: Have you concluded your conference?

Mr. Beilan: Yes. Now, would you repeat the question, please?

Mr. Kunzig: Will the reporter read the question?

(Whereupon, the following question was read:

"Now, in 1945 were you secretary of Section 8 of the Communist Political Association, as has been testified to under oath before this committee?")

Mr. Beilan: Same answer, same reason.

Mr. Kunzig: The committee is in possession of sworn testimony that in 1944, as a member of the Communist Party, you held membership book Number 78343. Is that correct?

(At this point Mr. Beilan conferred with Mr. Woolston.)

Mr. Beilan: Same answer, same reason.

Mr. Kunzig: And in 1945 we have sworn testimony that you held membership book in the Communist Party Number 87591.

Mr. Beilan: I invoke my privilege under the Fifth Amendment.

Mr. Kunzig: We have testimony that in 1946 and in 1947 you were an organizer of the professional section of the Communist Party of Eastern Pennsylvania and Delaware. Is that correct?

(At this point Mr. Beilan conferred with Mr. Woolston.)

Mr. Beilan: May I ask if you have this information why is it relevant that you ask me?

Mr. Velde: Because the matters about which counsel is asking you are certainly within your own knowledge either to admit or to deny. If they are not within your own knowledge then you can deny that you know anything about them at all. We like to go to the source of information.

(At this point Mr. Beilan conferred with Mr. Woolston.)

Mr. Beilan: Yes, but these questions do not relate to propaganda activities.

Mr. Velde: We do not care for any further argument. We would like to hear the answer.

Mr. Beilan: I would like to please have you explain the relevancy of this question.

Mr. Walter: It would be developed quite rapidly if you would answer the question. You would see the relevancy of the whole thing.

Mr. Beilan: Would you please repeat the question?

Mr. Kunzig: Mr. Reporter, would you please read the pending question?

(Whereupon the pending question was read:

"We have testimony that in 1946 and in 1947 you were an organizer of the professional section of the Communist Party of Eastern Pennsylvania and Delaware. Is that correct?")

Mr. Walter: I will explain to you the relevancy of this question. If you would answer to the best of your ability, then we could find out how extensive was the work you did, how many people joined and whether or not those people who joined became active in the dissemination of propaganda.

You see how it is all part of the picture, depending, of course, upon your answer.

(At this point Mr. Beilan conferred with Mr. Woolston.)

Mr. Beilan: Is the question, Mr. Chairman, that you want information about other people and not about me?

Mr. Velde: We want all information we can get about the Communist activities, whether it involves you or other people who have been engaged in Communist subversive activities which would destroy this country.

Mr. Beilan: I am willing to talk about myself and about no one else.

Mr. Velde: Please do, then.

Mr. Beilan: Will you agree not to ask me any question about anyone else?

Mr. Velde: We are not making deals with you or anyone else about any evidence you are called upon to give or any answers you are called upon to give.

(At this point Mr. Beilan conferred with Mr. Woolston.)

Mr. Beilan: I refuse to answer under the Fifth Amendment.

Mr. Kunzig: Were you a member, Mr. Beilan, of the International Workers Order in 1947 and 1949, a cited organization?

(At this point Mr. Beilan conferred with Mr. Woolston.)

Mr. Beilan: I invoke the privileges.

Mr. Kunzig: No further questions, Mr. Chairman.

Mr. Velde: Mr. Walter, do you have any questions?

Mr. Walter: Where was this boys' camp that you were connected with?

Mr. Beilan: Your information is inaccurate. It was not a boys' camp. It was a children's camp.

Mr. Walter: Excuse me, please. Where was this children's camp located?

Mr. Beilan: I believe if you have the court reporter read back, you located it.

Mr. Walter: Don't bother.

Mr. Beilan: I will answer it. On Route 309.

Mr. Walter: I am withdrawing the question. What did the children do during the period that you were at the camp? Were they given any courses of instruction on athletic training?

(At this point Mr. Beilan conferred with Mr. Woolston.)

Mr. Beilan: Well, I think we had a combination program of both athletic activities.

Mr. Walter: You said "I think we did". Did you?

Mr. Beilan: We did have such activities.

Mr. Walter: Now, who were the instructors?

Mr. Beilan: I am sorry, I did not finish.

Mr. Walter: Well, you heard me. You have testified as to what I wanted to learn. Who were the instructors of the camp?

Mr. Beilan: All right. They were Philadelphia teachers, for the most part.

Mr. Walter: Will you give us their names, please?

(At this point Mr. Beilan conferred with Mr. Woolston.)

Mr. Beilan: We had a staff of about ten or twelve people. I would like a few minutes to recall to my memory exactly the names of those people.

Mr. Walter: To save time, if you will prepare the list and mail it to the committee, that would be satisfactory.

Mr. Beilan: I will be very happy to do that.

Mr. Walter: What educational facilities were provided for the youth?

Mr. Beilan: As a teacher of 23 years I have always had the opinion that we should provide as fine educational facilities as possible. We had a library there of approximately 100 books.

Mr. Walter: What was in the library?

Mr. Beilan: Books which I obtained from the Free Library of Philadelphia at Nineteenth and Parkway.

Mr. Walter: Have we such a list?

Mr. Beilan: I have such a list. I will be glad to mail it to you.

Mr. Walter: Were the children instructed in communism?

Mr. Beilan: I have no knowledge of such instruction.

Mr. Walter: Who was in charge of the camp?

Mr. Beilan: I was.

Mr. Walter: That is all.

Mr. Kunzig: No further questions, Mr. Chairman.

Mr. Velde: The witness is excused.

Call the next witness.

Mr. Beilan: May I please submit a statement? I have a prepared statement.

Mr. Kunzig: Mr. Beilan, would you please return to the stand? I have one more question.

Mr. Walter: Mr. Beilan, I have asked you to come back because your statement was submitted at the completion of your testimony. I am not impugning your motives or beliefs and I have not gone further than five lines of your prepared statement.

You state "I make this statement in good faith and as a personal effort to counteract the false impressions which have resulted from the highly prejudicial publicity which has been leveled against the Philadelphia schools."

I want you to know that there has been nothing done in these hearings that would in anywise reflect on the Philadelphia schools or on the Philadelphia school system. Now if there are any individuals that we feel, in compliance with our duties to the Congress of the United States, should be brought before this subcommittee to testify, that is one thing. But this follows a very similar line.

Now you state further:

> "—unequivocally that I have always been a loyal American, that I have never advocated or participated in any illegal activity against the United States" and so on.

In light of that statement submitted at the completion of your sworn testimony, and this is not under oath, I will ask you have you ever been a member of the Communist Party?

Mr. Beilan: I submitted this statement under oath.

Mr. Walter: No, you did not. This was a statement submitted at the completion of your testimony, after you had left the witness stand.

Mr. Beilan: I will submit it now under oath.

Mr. Walter: All right, now. Do you swear that you have never been a member of the Communist Party?

(At this point Mr. Beilan conferred with Mr. Woolston.)

Mr. Beilan: I refuse to answer.

Mr. Walter: All right. Let this be made a part of the record.

Mr. Beilan: I am not under oath.

Mr. Walter: Oh, yes, you are under oath.

Mr. Woolston: Certainly he is.

Mr. Velde: The witness is excused.

Mr. Woolston: Could you repeat that last question? I do not think he understood it.

Mr. Walter: Read the question back, Mr. Reporter.

(The reporter read the question as follows:

"All right, now. Do you swear that you have never been a member of the Communist Party?")

Mr. Walter: The question was were you ever a member of the Communist Party.

Mr. Beilan: I am not now a member.

Mr. Walter: I said have you ever been.

Mr. Beilan: I refuse to answer under the Fifth Amendment.

Mr. Walter: All right.

Mr. Kunzig: I have no questions, Mr. Chairman.

Mr. Velde: The witness is excused.

That concludes the reading of the transcript of the testimony in the middle of page 314 of the transcript.

By Mr. Rhoads:

Q. Now, Dr. Hoyer, I believe you said that you have read the testimony which I have now offered in evidence regarding Mr. Beilan's testimony before the House Un-American Activities Committee, have you not?

A. I have.

Q. Dr. Hoyer, have you made any charges against Mr. Beilan as a result of his appearance before the House un-American Activities Committee on November 18, 1953?

A. There was a statement in the charges which referred to this investigation.

Q. Will you advise the Board in what respect, in your professional opinion, Mr. Beilan's conduct, demeanor, method of testifying and testimony before the House Committee on Un-American Activities warranted your charging him with professional incompetence?

Mr. Carroll: Mr. President, I think he is asking for the witness' opinion on the law. The facts are that he refused to answer. Whether or not it amounts to an offense or a reason for dismissal in his opinion is certainly not for the Board to hear from him. He has already made the charge. It is now for the Board to decide whether it is a ground for dismissal. I don't think the witness is in a position to give a legal opinion.

MR. RHOADS: I understand Mr. Carroll's objection, but I think the Board will agree with me that we are not asking for a legal opinion in this testimony. We are inquiring of the Superintendent of Schools, charged with the duty under the law, as we read it, of determining professional competency and fitness. And, therefore, I am asking the only expert we have, namely, the Superintendent of Schools, why in his opinion, based upon his professional experience, such conduct does result in what he conceives to be incompetency and lack of fitness.

MR. SAUL: I think the question is a proper question. The ultimate decision as to whether or not the conduct is sufficient in the opinion of the Board—that ultimate question is for the Board. But under the procedure in the first instance it is for the Superintendent, who has made his recommendation and charges to the Board. I think it is incumbent that the Board should know why in his opinion the conduct comes within the statute. So I am going——

MR. CARROLL: I will withdraw the objection, sir.

By MR. RHOADS:

Q. Will you answer the question, Dr. Hoyer?

A. In my opinion, the conduct of Mr. Beilan before the Committee simply supported and confirmed the situation that developed in my own office when I asked him questions in this same area. I was met with an absence of frankness, an absence of candor. I was met with a kind of evasion that was again demonstrated in the testimony before the Committee. And I think what happened before the Committee simply reenforced my own feeling with regard to what had happened in the meetings with me.

You know, the skill, the technical skill of a teacher is merely part of his qualifications for the job. It is a necessary part, to be sure. But there are other aspects of the qualifications of a teacher for a job as a teacher that I think in many instances transcend the technical qualifications of the position.

I think a teacher must be a person who is an intellectually honest person. I think the person who is a teacher must be a frank person; must be a person who deals with candor—deals in a fashion exhibiting candor. Because we are dealing in a peculiarly sensitive area. We are dealing with children who are influenced as much by impression as they are by any instruction or procedure that may go on in the classroom. And in my thinking, Mr. Beilan both in his conferences with me and in his appearance before the Committee gave evidence of a lack of that kind of frankness and candor and intellectual honesty which seemed to me to disqualify him for the position of teaching in the Philadelphia School System or, for that matter, any other school system.

Q. Dr. Hoyer, do you consider it as part of the professional duty of a professional employee of the School System to cooperate with the House Committee on Un-American Activities in hearings such as were held in Philadelphia on November 18, 1953?

A. I think it is a part of the civic responsibility of an individual to cooperate with a duly and properly organized committee of the government.

Q. And is civic responsibility one of the attributes of competency professional fitness of a teacher, in your opinion and experience?

A. It isn't only a matter of my belief, my opinion and my experience, but it is an item that is cited in the formal rating scheme prepared by the State of Pennsylvania.

Q. And what relation does the attribute of intellectual honesty, to which you have referred as being one of the qualifications of a competent teacher, have with the failure of that teacher to testify before a committee such as the House Un-American Activities Committee?

A. Well, I think it must be evident—it was evident to me, as it must be to most persons, that there was a withholding of information here that might have been given: And I think when a person has information that might be helpful to a committee of this kind and doesn't give it, then that person is not intellectually honest.

Q. Dr. Hoyer, in your opinion and based upon your long experience, is one of the attributes of a well-qualified, competent and fit teacher, respect of the community in which he lives and works?

A. When a teacher loses the respect of the community he has lost his usefulness in that community. That is sort of backing into that question but, nevertheless, that is the case. A teacher must have the respect of the community in order to do a satisfactory job in that community.

Q. When a teacher circumstanced such as Mr. Beilan on November 18, 1953, claims the privileges of the Fifth Amendment before the House Un-American Activities Committee, what, in your judgment and based upon your experience, is the effect of such action on his part so far as his respect in the community is concerned?

A. If you are asking me——

MR. CARROLL: Mr. President, I don't think that this witness is in a position to give the opinions of other people.

MR. RHOADS: I didn't ask for the opinions of other people, and if I did that, I will withdraw

any portion of that question that related to the opinions of other people and limit the question entirely to the opinion of this witness based upon his long experience as an educator and directed toward the question which I have asked.

MR. SAUL: Do I understand that you are asking a purely hypothetical question?

MR. RHOADS: I am not asking a hypothetical question. I am asking a question as to what effect, based upon his experience, the refusal of a witness or of a teacher to testify before the House Un-American Activities Committee would have so far as the respect of the community in which he is working is involved.

MR. CARROLL: Sir, in short he is asking for the opinion of the community in the opinion of Dr. Hoyer. Even Mr. Gallup should not be permitted to give a thing like that. I think that unless this man has taken some sort of a sampling or can show some concrete evidence of people to whom he has spoken, representatives of the community, then he is certainly not in a position to give such testimony as this.

MR. RHOADS: If there is any question by the Board of the Superintendent of School's competency to pass upon a question of that kind, I am willing to withdraw the question. I would think the Board would want his answer. But if there is the slightest suggestion that we are limited as though we were in a courtroom, which is distinct from this proceeding which I conceive to be an inquiry, an inquiry broad in its scope and in its character toward the professional fitness of a teacher, then I am not going to press the question because

I think that evidentially it might be full of all kinds of holes.

MR. SAUL: You are withdrawing the question?

MR. RHOADS: I am prepared to withdraw the question, sir.

MR. OBERMAYER: I would like to hear the question.

(The question was repeated by the reporter as follows: When a teacher circumstanced such as Mr. Beilan on November 18, 1953, claims the privileges of the Fifth Amendment before the House Un-American Activities Committee, what, in your judgment and based upon your experience, is the effect of such action on his part so far as his respect in the community is concerned?)

MR. SAUL: I think the objection is well founded in that an answer to that question would involve the witness stating what he believed is the reaction of the community now to this particular teacher's action. And I think the objection is well founded, unless there is some ground laid for Dr. Hoyer's ability to state what the reaction is.

MR. WEINROTT: Well, Mr. Saul, may I make my position clear?

MR. RHOADS: Well, Mr. President, I will come right back at that, and if it is a question of asking for the community's opinion, maybe he can't give it. I am going to ask what opinion he has so far as the effect on the respect which Dr. Hoyer has for this individual teacher—his failure to so answer has.

MR. SAUL: There is no objection to that. He is the Superintendent of Schools and he has a right to advise this Board of his reaction to it.

MR. RHOADS: And I am now limiting the question to his reaction.

MR. SAUL: Is there any objection to his own reaction to it?

MR. CARROLL: None whatever, sir. I assume the former question is withdrawn.

MR. SAUL: It is withdrawn.

MR. CARROLL: Thank you.

THE WITNESS: My own reaction to that situation was unquestionably an unfavorable one. As I have indicated before, I felt that Mr. Beilan in his attitude and in his answers to the Committee was not frank; did not exhibit candor; did not exhibit those qualities that I think are essential to a teacher. And that is bound to influence my opinion with regard to his behavior there.

By MR. RHOADS:

Q. Now, Dr. Hoyer, limiting your answer entirely to your own reaction to the conduct of a teacher, what is the effect upon you, as Superintendent of Schools, of the refusal on the grounds of the Fifth Amendment of Mr. Beilan to answer the questions which were propounded by the House Un-American Activities Committee on November 18, 1953?

MR. CARROLL: Mr. President, if it please, this is either the same question or it is back to the witness' opinion of the law. I think he has just answered that question.

MR. SAUL: You are objecting to the question?

MR. CARROLL: Unless Mr. Rhoads is attempting to get the community's opinion again indirectly.

MR. SAUL: I understand this question is directed purely to Dr. Hoyer's personal reaction.

MR. RHOADS: That is exactly it and no more. And the question is limited also to the Fifth Amendment, sir.

MR. SAUL: I think the Board is entitled to Dr. Hoyer's reaction.

THE WITNESS: Well, I believe that Mr. Beilan had a right to invoke the Fifth Amendment in this matter if he chose to do so. But I don't think he had the right to invoke the Fifth Amendment and remain a teacher in the Philadelphia School System.

MR. RHOADS: That is all.

MR. SAUL: Cross-examine.

CROSS-EXAMINATION.

By MR. CARROLL:

Q. Doctor, getting back to the 25th of June, 1952, or prior to that, you stated that you sent notice——

MR. RHOADS: Mr. Carroll, Dr. Hoyer said he couldn't hear you. Will you raise your voice?

By MR. CARROLL:

Q. Getting back to the first interview, Doctor, you stated that you sent notice to Mr. Beilan of this interview; is that correct?

A. That is correct.

Q. Did you state in your notice the subject matter of the interview?

A. No, I did not.

Q. At the time of the interview itself did you state the subject matter of the interview?

A. I think so.

Q. How did you do so?

A. I did it by asking a question at the request of Mr. Beilan, taken from the material that I had. The material I had was not in question form, but I based a question on the material that I had.

Q. In other words, he asked you to give him some information as to the scope of the interview; what it had to deal with?

A. That is correct.

Q. And in answer to that request you read him the question which you have formerly stated?

A. That's right. Of course, I indicated to him before that that I had this information and that I wished him to indicate to me whether the information was correct or not.

Q. We understand that. Did he then ask you to read the other questions that you had in mind asking him?

A. Yes, he did.

Q. And did you do it?

A. I did not.

Q. Did he ask you again later in the interview to do it?

A. That is possible. I wouldn't recall that exactly.

Q. You stated in your testimony that towards the end of the interview he did. Do you recall it now?

A. No, I didn't say that.

MR. RHOADS: I am not sure that he did. But the record will show whatever it was. But, as Dr. Hoyer has said, it might well have been the case.

By MR. CARROLL:

Q. In short, Doctor, would it be true to say that despite this man's attempts to get from you information as to the scope of the interview, the limit of your proposed questioning, you did not give it to him except by telling him one question?

A. That is correct, because he had indicated to me very definitely that he could not answer that question. I saw no point to asking additional questions when he didn't answer the first one.

Q. Didn't you testify, Doctor, that at the first interview the net result was that you suggested that he seek counsel?

A. No, I did not.

Q. You agreed——

MR. RHOADS: I don't think the testimony so indicates.

THE WITNESS: I indicated to him that I was satisfied to have him consult counsel.

By MR. CARROLL:

Q. And that was perfectly agreeable to you?

A. That was agreeable to me, yes.

Q. You excused him on that basis?

A. That's right.

Q. You did not then insist on an answer to that question?

MR. RHOADS: Just a minute. If the Board pleases, I would like to have a definition of what is the connotation of the word excused. If by the question it means he was excused from further discussion, I have no objection to the question. But if there is any suggestion in that question that Dr. Hoyer in June of 1952 excused the conduct, then I object to the question.

MR. SAUL: I don't think there is any such connotation. I don't think any of us so understood it.

By MR. CARROLL:

Q. All that I wish to get from you, Doctor, is whether or not at that time you insisted on an answer

to that question then, or did you instead acquiesce in Mr Beilan's suggestion that he seek counsel?

A. I asked the question. If that is insistence, I insisted. If it isn't, I didn't. I simply asked the question in a perfectly normal relationship between Superintendent and teacher. I wanted to get a constructive answer to it if I could. And that is all there was to that.

Q. And you stated, I believe, in your direct examination that when he suggested that he wanted to see counsel—I think your very words were, that was entirely satisfactory to you.

A. That is right.

Q. To return to the former question, you did not, therefore, insist on an answer to that question then?

A. No.

MR. RHOADS: That is objected to on the ground that he has already answered the question a half dozen times.

MR. CARROLL: The witness has answered the question.

By MR. CARROLL:

Q. Did you at this interview allow him to have his counsel present?

A. No.

Q. Did you offer to confront him with the person who had made these statements about him which you thought were so——

A. No. This was not a hearing or a trial——

Q. The question is——

MR. RHOADS: Wait a minute. Let him answer the question.

MR. CARROLL: He is not answering it.

MR. RHOADS: He is answering it to my satisfaction at any rate. If you want to ask him anything more, go ahead.

THE WITNESS: There was no necessity, as I saw it, at that time for me to do anything of the sort.

By MR. CARROLL:

Q. Was it your thought, Doctor, that all of these questions which you intended to ask him would deal with his loyalty?

A. Will you say that again?

Q. Was it your intention to ask him questions about his loyalty?

A. It was my intention to ask questions dealing with the information that I had.

Q. Did all that information relate to loyalty?

A. That information related to a number of things. You might say loyalty was one of them.

Q. Would you state the others?

A. Yes.

MR. RHOADS: If the Board pleases, this witness has already stated that the questions had to do with his association with the Communist Party, with front organizations and with subversive activities. And I think that, under those circumstances, whether the matter had to do with loyalty is a conclusion that this Board may reach rather than as a definition coming from him.

MR. SAUL: I should think that if, as counsel states, it is agreed that the information had to do with the items that Mr. Rhoads says, that you have got all that you want.

MR. CARROLL: I will put the question that way then.

MR. RHOADS: As the witness has already testified in his direct examination.

MR. SAUL: I think it is perfectly proper that that should be on the record, but I think with your statement it is on the record.

By MR. CARROLL:

Q. Doctor, you heard Mr. Rhoads' description of the type of question you intended to ask, did you?

A. Yes, I heard that.

Q. Is that an accurate statement of the questions you intended to ask?

A. Yes.

Q. The type of question?

A. Yes, that is fairly accurate.

MR. RHOADS: If you want to add to it, Dr. Hoyer, go ahead.

THE WITNESS: I don't want to add anything to it.

By MR. CARROLL:

Q. You said on your direct examination, Doctor, that you considered this inquiry part of your duties as Superintendent of Schools, correct?

A. Considered what?

Q. The conduct of this interview as part of your duty as Superintendent of Schools.

A. That is correct.

Q. Under what law, sir?

MR. RHOADS: I object to that, sir, because I think that is again a matter of conclusion. Dr. Hoyer has testified that this was a professional interview brought about because he felt that it was part of his duties to do so. And whether he acted properly is a matter for this Board to conclude, and whether he acted under the law is a

matter for this Board to conclude under advice of counsel or its own deliberate and separate consideration.

MR. SAUL: I am inclined to believe that as long as Dr. Hoyer was given full opportunity to express all of his reasons and his personal opinions as to why he took this action, the question if it can be answered by Dr. Hoyer is a proper one. I don't think we should limit the examination.

MR. CARROLL: Thank you, sir.

By MR. CARROLL:

Q. Perhaps I can make the question a little easier for you, Doctor, by sub-dividing it. Did you conceive that you were proceeding under the Pechan Act?

MR. RHOADS: That is objected to, sir. I don't care what act he conceived he was acting under. He did a certain thing. And I am not going to permit, so long as I am in the position of trying to advise in this hearing, this record to show that Dr. Hoyer called somebody in thinking in terms of sub-section 1 of some law and acted accordingly. He was acting as the Superintendent of Schools, and he either acted properly in an attempt to find out the fitness and competency of a teacher or he didn't. And I don't purpose to have the record, if I can help it,—to have the record of these hearings find Dr. Hoyer, Brewster Rhoads or any member of this Board committed to some proceeding in accordance with the section of an act or something of that kind which my friend is trying to get. What he is trying to do is to convert this hearing into a suggestion that what we are doing here is testing out this man's

loyalty. Dr. Hoyer was trying to find out the professional fitness of a teacher.

MR. CARROLL: Mr. President, if you please, I have no intention of seeing this proceeding become a loyalty hearing. Mr. Rhoads has stated that it is not. I agree with him completely. I think that you all agree with me, however, that the office of the Superintendent of Schools is an office created purely by statute, and that his actions in any case depend upon the authority granted him by a statute of this Commonwealth. Whether or not he believes he is acting properly and whether or not he was in fact acting properly, is a crucial issue in this hearing. Since Dr. Hoyer has been given such a free reign in his direct examination to discuss what I believe to be the law, it would seem to me that we ought to be able to question him on whether or not he thought he had authority and where he thought he got it.

MR. RHOADS: Let Dr. Hoyer answer the question.

MR. SAUL: I am going to rule that he may answer the question.

MR. LABRUM: I would like to take an appeal from that because I don't believe that Dr. Hoyer or any complaining witness has to set forth the section of a particular statute under which he makes a complaint. That is utterly ridiculous for a superintendent in the public schools to have to sit down and read the law when he is advised by his counsel whether or not under certain circumstances an action lies. I don't think he has to answer that question. I would like to take an appeal from your ruling, Mr. Chairman.

MR. DOWNS: I second it.

MR. SAUL: Read the question.

(The question was repeated by the reporter as follows: Did you conceive that you were proceeding under the Pechan Act?)

MR. SAUL: The question is shall the Chair be sustained. If you answer yes, the Chair is sustained. If you answer no, the Chair will be overruled. Call the roll, Mr. Secretary.

(The Secretary called the roll.)

MR. SAUL: The Chair has been overruled and, therefore, the objection to the question is sustained by the Board.

By MR. CARROLL:

Q. Dr. Hoyer, did Mr. Beilan at the time of either interview ask you by what authority you were acting?

A. No.

Q. Do you recall any conversation with Mr. Levitan, counsel for the Teachers' Union and for Mr. Beilan, between the time of the first and second interviews specifically requesting from you information as to what you conceived to be your authority for asking these questions?

A. I had no conversation with Mr. Levitan.

Q. You stated, Doctor, that in your opinion the refusals of Mr. Beilan to answer your questions and those of the Velde Committee——

MR. RHOADS: May we use the expression the House Un-American Activities Committee?

MR. CARROLL: That is perfectly agreeable.

MR. RHOADS: I would suggest that the record not be confused with personalities which sometimes become unfortunate in these matters.

MR. CARROLL: I will omit that reference from the question.

By MR. CARROLL:

Q. I will limit my question to the interviews with yourself, sir. Did you believe that Mr. Beilan's refusal to answer your questions demonstrated his incompetency as a teacher?

A. Yes, I considered that.

Q. Did you report that to his principal?

A. No, I did not. I didn't report anything dealing with this matter to his principal.

Q. Did you rate Mr. Beilan in that term on the prescribed State rating form one way or another? Did you rate him?

A. I did not rate him at that time.

Q. But at that time you believed him incompetent; is that correct?

A. I think that is reasonably correct.

Q. It is your duty to rate as unsatisfactory teachers whom you believe incompetent; is that correct?

A. That is correct.

Q. But although you believed Mr. Beilan incompetent at that time, you did not so rate him; is that correct?

A. No, that is not correct. But I did not pass it on to the principal of the school at that particular time. And there are a number of reasons for that.

MR. RHOADS: State the reasons.

By MR. CARROLL:

Q. You have since that time, however, rated Mr. Beilan unsatisfactory?

A. That is correct.

Q. When did you do that, Doctor?

A. I did that at the time of his suspension.

Q. Which was——

A. I think it was November 20, 1953.

Q. Do you have the rating slip there, Doctor?

A. Yes, sir, I have it here.

Q. Doctor, do you recognize these cards which I now hand you as the official records of ratings for the Philadelphia school teachers?

A. These are the cards that are kept in the schools for teachers.

Q. These deal with Mr. Beilan; is that correct?

A. They deal with Mr. Beilan.

MR. RHOADS: If the Board please, if there is any question possibly we can cut the knot here. There is no issue, so far as counsel for the Board is concerned, as to any unsatisfactory ratings of Mr. Beilan in so far as his classroom performance is concerned. I think, as I have indicated to the Board before, that has not been in issue and is not in issue here.

MR. SAUL: Of course, these hearings are all separate, and we have to have the same——

MR. RHOADS: I am prepared now, Mr. President, to so state to Mr. Carroll.

MR. SAUL: State it for the record.

MR. RHOADS: In so far as the performance of Mr. Beilan's duties in the classroom is concerned, there is nothing, so far as the records of the School Board are concerned, to show anything to the contrary other than a satisfactory performance.

MR. SAUL: Well, could you add to that, if it be a fact, that there is no complaint in this proceeding about his classroom performance?

MR. RHOADS: I will agree to what the President has just said as being a statement with which I can concur.

MR. SAUL: Is that satisfactory?

MR. CARROLL: Fine. Thank you, sir. I would, however, for a moment like to pursue this.

MR. SAUL: All right.

By MR. CARROLL:

Q. Could you explain, Doctor, the significance of these terms on the rating card? These are abbreviations. The first one is "INS".

A. That is instruction.

Q. The second one is "MAN".

A. Management.

Q. The third is "COOP".

A. That is cooperation.

Q. In other words, Doctor, this rating is made on the basis of not only instruction and management but also cooperation?

A. That is correct. That is right.

By MR. DOWNS:

Q. Cooperation with whom?

A. Cooperation with the principal of the school.

MISS GOLDEN: Mr. President, I should like to raise a question here. I think it would be helpful if Dr. Hoyer would explain why he did not pass on to the principal of the school the information he had, or the rating he was giving to this particular person.

MR. SAUL: Miss Golden, may I suggest that the questions from the Board be asked after the cross-examination is concluded?

MISS GOLDEN: That seems to me to be the question in the mind of the attorney, as to why this wasn't passed on.

MR. RHOADS: I had that down, Miss Golden, to ask the witness as soon as he was turned over to me for re-direct examination, the reasons why Dr. Hoyer did not immediately turn it over, so that I have not neglected it in my notes here.

MISS GOLDEN: I thought the line of questioning was directed to that.

MR. CARROLL: I will leave that for Mr. Rhoads.

By MR. CARROLL:

Q. The last rating on that card, Doctor, is dated November 30, 1953; is that correct?

A. That is correct.

Q. And what is the rating?

A. The rating is marked "80". Numerically it is marked "80".

Q. Is that a percentage rating, Doctor?

A. That is a percentage rating.

Q. Is that considered a satisfactory rating?

A. That is a satisfactory rating.

Q. What would you say would be the lowest percentage rating that would be considered satisfactory? Is there a rule on that, Doctor?

A. The lowest rating that would be considered satisfactory would be 70 for this particular situation.

Q. And this is 80?

A. That's right.

Q. And what is the notation beside that rating, Doctor?

A. The word "suspended", you mean?

Q. That's right.

MR. CARROLL: I should like, if the Board please, to offer in evidence as Beilan's Exhibit No. 1 the rating card which we have referred to, for the purpose of showing that over a period of twenty-three years all of Mr. Beilan's ratings, which, as Dr. Hoyer explained, include not only instruction and management but also cooperation with other people in the school, are satisfactory or better. And that even on November 30, 1953, after this particular experience with the Un-American Activities Committee of the House of Representatives had become known, and after apparently his appearance before Hoyer had become known to the principal of the school, he was nevertheless rated 80 percent by the principal.

MR. SAUL: No objection to that, I take it, Mr. Rhoads?

MR. RHOADS: Oh, no. It is all a matter of record.

(Two rating cards of Herman Beilan were marked for identification as Beilan's Exhibit No. 1.)

MR. SAUL: It will be admitted.

MR. RHOADS: I don't go along with my friend's argumentative statement, but the records are there and they speak for themselves, of course.

MR. SAUL: I understand. It is only the record that is submitted.

MR. WEINROTT: Technically he had it marked for identification. In his case he normally would offer it.

MR. SAUL: It doesn't make any difference. It is admitted in the record now.

MR. WEINROTT: If you want to admit it out of order——

MR. SAUL: Yes. We will admit it now. It is right in the place where the examination is going on.

By MR. CARROLL:

Q. Doctor, by way of a question in summary, your rating of unsatisfactory, which you stated you made on November 23, 1953——

A. November 20.

Q. Pardon me. November 20, 1953. That is predicated purely on the refusal to answer your questions and the questions of the House Committee on Un-American Activities.

A. That is correct.

Q. No other reason at all; is that correct?

A. The reasons growing out of that situation.

Q. Doctor, you stated on direct examination by Mr. Rhoads that in your professional opinion a teacher had the right to refuse on the ground of the Fifth Amendment to the United States Constitution to answer a question put to him by a committee of the House of Representatives of the United States.

A. That's right.

Q. But that he did not have the right simultaneously to do that and continue as a school teacher.

A. That is correct.

Q. Could you state offhand, Doctor, any other rights of a citizen which a teacher must give up in order to be a teacher in your system, or is this the only one?

MR. RHOADS: Of course, it seems to me that that is completely beyond the scope of these charges, but if the Board would be interested in

having Dr. Hoyer's observations, I have no objection to the question.

MR. CARROLL: It goes to the basis for his opinion.

MR. SAUL: Is it objected to?

MR. RHOADS: I am not going to object to it unless the Board feels we are wasting time. Go ahead, Doctor.

THE WITNESS: Well, I would be glad to answer that. I think there are a number of rights or a number of ways of doing things that a teacher may not indulge in and remain to be a teacher. Some of them are specifically referred to in the Tenure Act, for example. Historically a teacher has been expected to lead an exemplary life. He has been expected to lead a life that is above reproach. And when a teacher does not lead a life that is above reproach he forfeits his right to be a teacher. I think in that general category there are some rights——

By MR. CARROLL:

Q. Constitutional rights, Doctor?

MR. RHOADS: Just a minute. Let him answer.

THE WITNESS: There are some acts that probably would not be considered immoral acts in certain other areas of the community, but in the life of a teacher they are distinctly immoral acts and can not be condoned on the part of the teacher. There are certain freedoms which an individual gives up when he becomes a teacher. There isn't any question in my mind about that. He dedicates himself to a kind of life that is different from that of the ordinary citizen.

By MR. CARROLL:

Q. Doctor, you have been apprized, I have no doubt, or have at least read in the newspapers, of Dr. Albert Einstein's view of this matter. Would you fire him?

MR. RHOADS: Now that I object to, sir. The issue of Dr. Einstein, the issue of the G. E. or the issue of any other activities outside of what is going on in connection with these charges I do object to, sir.

MR. SAUL: The objection is sustained. I think that is properly part of your argument.

MR. CARROLL: I have no further questions.

RE-DIRECT EXAMINATION.

By MR. RHOADS:

Q. Dr. Hoyer, Mr. Carroll has referred to the rating card going back a number of years of Mr. Beilan and terminating, I believe, in November of this year, the latter part of November, with the notation of "suspended" thereon. You have seen that card.

A. That is correct.

Q. Now, prior to the making up of that card and the later entries that were made thereon, you had had conferences with Mr. Beilan which lead you, as you said, to conclude that he was incompetent and unfit by reason of his failure to answer you; is that correct?

A. That is right.

Q. Did you communicate to his principal your conclusion at that time as to the competency of Mr. Beilan?

A. I did not communicate with the principal.

Q. And why did you not?

A. I didn't communicate with him at that time because I had before me a considerable number of these cases. Out of consideration for the individuals who were concerned I wanted to move very slowly and very carefully in my investigations of those cases and of the material that I had before me. This took a considerable amount of time, as you may suppose, because there are some other things that a Superintendent of Schools must do in order to fulfill all the requirements of his position. This took a long period of time. And I did not communicate with anyone concerning any of these conferences that I had because I didn't know what the outcome of this would be at the time. Therefore I did not communicate with the principal of the school.

Now may I say, Mr. Rhoads, just a word with regard to that last notation on the card?

Q. The notation "suspended"?

A. Well, the whole line there. The line all the way across there giving the date and certain other figures and the word "suspended" is with it.

We ask the principal of a school at the time a person leaves the School System to give a rating. But the principal of the Gratz High School was under no necessity for giving a rating at this particular time at all because it had not been determined at that time that Mr. Beilan was to leave the School System, and it hasn't yet been determined that he is to leave the School System. I suspended him, true. But this notation did not have to be made. This is part of, I think, the fact that Dr. Hoffman hasn't been there too long and perhaps hasn't met this situation before.

Q. Is Dr. Hoffman the principal of the Gratz School?

A. He is the principal of Gratz High School.

Q. And was it Dr. Hoffman who made or under whose supervision were made the last entries of 11-3-53?

A. I would say so, yes.

Q. At the time these entries were made had you discussed with Dr. Hoffman the circumstances involved in the charges which are now being considered?

A. I hadn't discussed this with anyone—in the respective schools?

Q. That is what I mean. In other words, Dr. Hoffman was Mr. Beilan's principal, was he not?

A. That is right.

Q. And you considered that this was a matter of policy between you and the Board of Public Education; is that not correct?

A. That is correct.

Q. And incidentally, the matter had been before you and before the Board for many months prior to November, 1953; is that correct?

A. That is right.

Q. And it was a matter upon which you felt that you should act with fairness, slowness and discretion; is that correct, Dr. Hoyer?

A. Unquestionably. From the point of view of a professional relationship it was absolutely necessary that I do that. Not only was it necessary, but congenial.

MR. RHOADS: Now, Mr. Carroll, have you the letter of November 20, 1953, which was sent to your client by Dr. Hoyer?

MR. CARROLL: The letter is dated November 23. I think that is the one you are referring to.

MR. RHOADS: I thought it was November 20, but whatever date it is. It is November 23. Thank you, Mr. Carroll.

Mr. Carroll has produced, and I offer as Board's Exhibit No. 4, the letter of November 23, 1953, from Louis P. Hoyer, Superintendent of Schools, to Mr. Herman Beilan, in which the Superintendent of Schools states, "You are rated unsatisfactory," and then gives his reasons therefor which I do not think need be read into the record at this time if I offer the letter itself, if that is satisfactory to you, Mr. Carroll.

MR. CARROLL: Yes.

MR. RHOADS: I offer such letter.

(Letter dated November 23, 1953, was marked for identification as Board's Exhibit No. 4.)

MR. RHOADS: May we use a copy because you have some notations there that I don't want to pry into. I don't know what they may be. We will offer a copy in substitution for the original.

That concludes the Board's case, Mr. President.

By MR. OBERMAYER:

Q. Dr. Hoyer, I wanted to ask you whether at the meeting with Mr. Beilan on June 25 and October 14, 1952, there was anyone else present but yourself and Mr. Beilan.

A. Mr. Soken was present.

Q. Just the three of you?

A. That is all.

Q. Was there any publicity given to this hearing in advance?

A. Not only was there no publicity given to it either at that time or later, but there was a decided desire on our part not to make this thing spectacular because at that time it was a legitimate inquiry, as I

conceived it, into a matter that pertained to the excellence, to the quality of a teacher's service.

Q. The only persons there were Mr. Beilan, Mr. Soken and yourself?

A. That's right.

Q. Mr. Soken is connected with counsel?

A. Mr. Soken is the Assistant Solicitor of the Board.

By Mr. Weinrott:

Q. Dr. Hoyer, I would like to get this on the record because a lot of these questions, I think, that Mr. Carroll asked were of your opinion, but I thought Mr. Rhoads had qualified you more or less as an expert in public education. Now, is it a fact that over the last forty-six or forty-seven years of your identification with the School System of Philadelphia that you have actually had exposure to, seen, talked with millions of children at all levels of the School System, not only in Philadelphia but all over the United States, and thousands upon thousands of school teachers and administrative officers both in the Philadelphia public schools and other public schools in the whole of the United States, and from time to time you have talked with these people generally and specifically about a lot of things?

A. That is true.

Q. Exchanging information?

A. Yes.

Q. And whatever it is school teachers and school people do. Is that a fact?

A. That is a fact. I don't know whether I can subscribe to the millions but——

Q. Well, hundreds of thousands then. I think if you added up each year you will probably get into the million class. Then do I understand that if a teacher

has lost that touch and that confidence, in your opinion now and from your long association, that that teacher actually in your opinion destroys or loses his or her efficacy as a teacher?

A. There is no question in my mind about that.

MR. CARROLL: Mr. President, this is the same question Mr. Rhoads asked about his impression and the community's impression and which we objected to before. I repeat the objection, sir.

MR. RHOADS: May I suggest that it is not the same question. It is a very entertaining and interesting question.

MR. SAUL: If the question has no reference as to whether or not this particular teacher has lost the confidence of the community, I think it is perfectly proper to ask the question. But if the inference or the implication of the question is that this particular teacher has lost the confidence of the community, then I will rule the question is improper.

MR. CARROLL: Sir, on the former hypothesis that it is a general question, it is plainly irrelevant. If it is the particular question to which you refer, then it is objectionable on the grounds previously stated.

MR. SAUL: If it is irrelevant the Board can consider that at the time when it considers the testimony. But I think it should be made plain at this time whether this question has any reference to the loss of faith on the part of the community in this particular teacher.

MR. WEINROTT: Well, of course, it was a general question.

MR. SAUL: And has nothing to do with this particular teacher?

MR. WEINROTT: No.

MR. LABRUM: I make the observation, Mr. President, that the judge has a right to ask any question he sees fit in order to come to a determination as to the merits of a particular case, whether it is relevant or irrelevant.

MR. SAUL: That is true. But counsel still has the right to put an objection on the record to the question.

MR. LABRUM: They can yell but it doesn't get them any place.

MR. CARROLL: Mr. President, I should like a formal exception if the objection is overruled.

MR. SAUL: Well, you may have it. The question, I think, has been answered with the understanding that it has no particular reference to this particular teacher's——

MR. WEINROTT: That's right.

MR. SAUL: Is there anything further that either of you two gentlemen desire to offer?

MR. RHOADS: I have nothing further.

MR. SAUL: Then you may proceed with the defense.

MR. CARROLL: Mr. President and Members of the Board, as I stated before, we have no intention of making a loyalty proceeding out of this hearing.

MR. DOWNS: I can't hear you.

MR. CARROLL: We have no intention of making a loyalty proceeding of this hearing. We agree

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MR. SAUL: The question has been objected to and the Chair rules that that question is not a proper question to be directed to counsel, the hearing having been closed and the testimony closed. Is there any appeal from the decision?

MR. WEINROTT: No, I won't take any appeal. I want to ask another question. As a factual situation——

MR. LABRUM: Is this record closed? Let's get this straight. Because I don't want the record to show that you are asking a lawyer a question that has nothing to do with the case. Let's get it straight. Is the record closed? Was the record closed before you began?

MR. WEINROTT: All right, I withdraw the question.

MR. SAUL: Gentlemen, under our rules of procedure counsel for either side may within ten days from today file a written brief to present to the Board. The stenographer will get the testimony out as soon as possible for the use of counsel. A copy will be given to you, a copy to Mr. Rhoads and a copy to the members of the Board. And at the end of ten days these hearings will be closed in accordance with the provisions of the statute.

MR. DOWNS: This hearing you mean.

MR. SAUL: This hearing.

MR. OBERMAYER: Mr. Saul, I think we ought to say to Mr. Carroll that if he sends us one copy of his brief the Board of Education will see that additional copies are made to go to the Board. It will not be necessary for you to prepare a large

with Mr. Rhoads and Mr. Weinrott who stated that the only issue is whether this particular man refused to answer certain particular questions and whether, as a matter of law, that amounts to a ground for dismissal. We have already heard the questions that were asked and answered under certain circumstances which we have attempted to develop.

The conclusion is attempted to be drawn that this has to do with his competency and is a violation of the School Code. I think that all the evidence we want to present on the question of competency is already in the record. Since it seems so vague and nebulous a thing, what the particular laws are which have been violated, and we can't discover them, we are not in a position to present evidence on that. Therefore, sir, we intend to present no evidence on loyalty, competency or violation of the School Code.

We would simply like to state to the Board that although we agree that there is this very narrow issue of refusal to answer questions, nevertheless, the undertone of this entire unhappy proceeding has had to deal with loyalty. Therefore, we intend to prevent, if possible, any evidence of it in this proceeding. We earnestly invite the Board to begin, with respect to Mr. Beilan, proper, formal loyalty proceedings under the Pechan Act where it properly belongs and nowhere else. With that we have finished.

We thank the Board very kindly for a fair hearing.

MR. RHOADS: With submission to the Board, I simply want the record to show that formally I do not subscribe to the language which Mr.

Carroll has used in connection with his concept of the issues that may be involved. I want nothing to indicate that my not making argument here is concurrence with any inferences which may have come from the statement which he has just made. And I don't think it is necessary for me to argue the question.

MR. SAUL: I think we all understand you don't agree with his conclusion.

MR. WEINROTT: May I ask Mr. Carroll a question? Mr. Carroll, I want to know from you as a lawyer whether it is your conception of the proper management of a school system, a public school system, that when a teacher is called—I don't care what the reason is—by the Superintendent of Schools and is asked to answer questions of any kind in connection with schools and school work and himself in connection with schools, that that teacher does not have to answer those questions?

MR. LABRUM: Mr. Chairman, I object to that. I don't think that is fair to put a lawyer on the spot that way. That is aside from the fact we are sitting here hearing the case. I object to that. I don't think that is fair.

MR. OBERMAYER: Mr. Carroll is just a lawyer here.

MR. LABRUM: He has no right to be subjected to cross-examination, and you know that better than anyone else.

MR. CARROLL: Even more properly, sir, the Board has no right to be subjected to the speech I was about to make.

number of copies to go to each member of the Board.

MR. CARROLL: Thank you very much.

MR. OBERMAYER: I think it also ought to be understood when this meeting is adjourning today, it is adjourning with the understanding that the taking of testimony has ended, and the only reason for the ten-day adjournment is in order to permit counsel to file briefs, and no additional testimony will be taken by reason of that ten-day adjournment.

MR. CARROLL: That is understood, sir.

MR. SAUL: Mrs. Lewis, do you have a question?

MRS. LEWIS: I had one question I would like to ask Mr. Beilan. As I understand from the record of the Un-American Activities Committee——

MR. RHOADS: Mr. Beilan has not been sworn.

MR. SAUL: I rule that as this is a hearing on charges made against Mr. Beilan, any member of the Board has the right to ask Mr. Beilan a question if he or she so desires.

MR. RHOADS: May I be heard for one moment, Mr. President, on that? Obviously I would be the last person to object to any such proper ruling that you have just made with which I entirely agree and to which I subscribe, but this is a hearing. It is a hearing under statute. And a witness who is heard, I respectfully suggest, should be sworn. That is all I am asking.

MR. SAUL: I think that is true, sir. Did you say you withdrew the question?

MRS. LEWIS: Technically I hadn't realized Mr. Beilan was not a witness. There is a question I would like to ask him if he would be sworn.

MR. SAUL: You would like to?

MRS. LEWIS: Yes, but not if it upsets things.

MR. SAUL: I rule that Mr. Beilan may be sworn and that Mrs. Lewis may ask the question if she so desires. Is there any appeal from that decision?

MR. LABRUM: Yes, sir, there is an appeal. I would like to be heard on it. You are compelling this man to testify against the advice of his attorney. And this Board has no right to compel him to testify. And I think it is a very, very extraordinary procedure if you do.

MRS. LEWIS: I withdraw the question.

MR. SAUL: The question is withdrawn. Are there any other comments or questions by any members of the Board before we adjourn this for ten days?

MR. DOWNS: Just for my own information, Mr. LaBrum, this defendant here has not said whether he didn't want to testify or not.

MR. LABRUM: His counsel has not offered him to testify. His counsel is the one who determines that.

MR. DOWNS: I missed that.

Board's Exhibit No. 1.

(Letter dated June 19, 1952, from Louis P. Hoyer to Herman A. Beilan. The letter was read into this transcript beginning on Page 21a.)

Board's Exhibit No. 2.

(Letter dated October 9, 1952, from Louis P. Hoyer to Herman A. Beilan. The letter was read into this transcript beginning on Page 21a.)

Board's Exhibit No. 3.

(Transcript of testimony of Herman Aaron Beilan before a Sub-Committee of the House Un-American Activities Committee of the House of Representatives on November 18, 1953. The testimony is copied into this transcript beginning on Page 24a.)

Board's Exhibit No. 4.

November 23
1953

Mr. Herman Beilan
7641 Thouron Street
Philadelphia 38, Pennsylvania

Dear Mr. Beilan:

You are rated unsatisfactory as the result of two interviews I had with you, one on June 25, 1952 and the other on October 14, 1952, and also as a result of your refusal to answer certain questions asked of you by the Sub-Committee of the House Committee on Un-American Activities, on Wednesday, November 18, 1953, in the Court House, Ninth and Market Streets.

I told you at the beginning of our conference on June 25, 1952 that certain information had come to me which, if true, reflected seriously on your professional qualifications to be a teacher. I told you that our conference was on a professional basis and that in fairness to you as a professional employe I was going to ask you directly to confirm or refute the statements I was about to read to you. I then asked you whether in 1944 you were press director of the professional section of the Communist Political Association. You said you wanted advice of counsel and would call me to arrange for a further appointment. You also said you wanted to hear the rest of the questions and asked what the last date was on the sheet from which I was reading, but I did not tell you because you refused to answer the first question.

On October 14, 1952, at our second interview you said you had obtained the advice of your counsel, Mr. Levitan, who said you could not legally be asked questions about political and religious beliefs, and that

there was no legal basis for asking these questions. You were also told that you risked possible dismissal if you persisted in your refusal. You said you understood this.

You refused to answer questions as to your past associations with organizations of doubtful loyalty when asked by the Sub-Committee of the House Committee on Un-American Activities. You invoked the Fifth Amendment of the Federal Constitution as the basis of your refusal.

It is my considered professional opinion that your refusal to answer these questions go to the essence of your professional fitness to be a teacher and makes you incompetent to teach in the Philadelphia Public Schools.

You failed in your civic responsibility of aiding the Superintendent of Schools in his effort to determine professional fitness to teach in our schools. It is my duty to separate from the teaching system any employe who is professionally unfit. Your conduct prevented me from carrying out my administrative duties.

You failed in your duty to cooperate with a properly constituted Sub-Committee of the House of Representatives of the United States of America. Instead of performing your duty toward this Sub-Committee as every citizen should have done in similar circumstances, you invoked the Fifth Amendment as the basis of your refusal to cooperate.

Your conduct violates the school laws of this Commonwealth. I therefore conclude that you are guilty of wilful and persistent violation of the school laws.

I shall present this matter to the Board of Public Education with the request that steps be taken to dismiss you under Section 1122 of the Public School Code of 1949.

Sincerely yours, Superintendent of Schools

(74a)

Beilan's Exhibit No. 1.

(Two rating cards of Herman Beilan.)

LAST NAME: Beilan — FIRST NAME: Herman — [redacted]: Albert

DAY NO. DAY YEAR	PRESENT POSITION: GRADE, SUBJECT, OR POSITION	PRESENT POSITION: SCHOOL	PRESENT POSITION: DIST.	RATED FOR	NUMERICAL RATING: INS.	MAR.	COOP	TOTAL	RATED BY	OFFICIAL POSITION
6-26-30	2nd Cert	Crispin	10	Per Cert.				S	S. N. Lowry	Pr
1-30-31	"	"	10	"				S	S. N. Lowry	Pr
6-26-31	"	"	10	Cl. B.				G	S. N. Lowry	Pr
1-30-32	"	"	10	"				G	S. N. Lowry	Pr
	"	"	10	"				G	S. N. Lowry	Pr
	"	"	10	"				G	S. N. Lowry	"
	"	"	10	"				G	S. N. Lowry	"
1	"	Ferguson	7	B 1				G	Leave	
6/26	"	"	7	B 1				G	" " "	
1/31	"	"	7	B 1				G	" " "	
6/26/33	"	"	7	B 1				G	" " "	

FORM B E [illegible] OF TEACHERS. CUMULATIVE RECORD—SCHOOL DISTRICT OF PHILADELPHIA. (OVER)

[redacted]

FIRST NAME: Berlan — MIDDLE NAME: Herman Albert

DAY MO. DAY YEAR	PRESENT POSITION: GRADE, SUBJECT, OR POSITION	SCHOOL	DIST.	RATED FOR	NUMERICAL RATING: INS.	MAN.	COOP	TOTAL	RATED BY	OFFICIAL POSITION
1/31/36	8 B	Ferguson	7	B 1 (March 1937)				G	F A W	SP.
6/26/36	8 A	"	7	B 1				E	F A W	"
1/31/37	8 A	"	7	B 1				G	F A W	
6/26/37	" "	"	7	B 1				G	F A W	
1/31/38	" "	"	7					S	- - -	
6/24/38	"	"	7					S	" "	
1/31/39	" "	"	5			25	18	S	" "	
6/11/40	6 B	"	5					S	" "	SP.
1/31/41	8 B	"	5	Sab Leave				S	- - -	
6/26/41	6 B	"	5	"	"			S	- - -	
1/31/42	7 A	"	5					S		

FORM S E H 208—RATING OF TEACHERS, CUMULATIVE RECORD—SCHOOL DISTRICT OF PHILADELPHIA (OVER)

LAST NAME: Berlan | FIRST NAME: Herman | MIDDLE NAME: Albert

DAY MO. DAY YEAR	PRESENT POSITION GRADE SUBJECT OR POSITION	SCHOOL	DIST	RATE	SALARY	MAKE UP	REMARKS	OFFICIAL POSITION
6/24/42	7a	Ferguson	5					
6/24/42	7A	Ferguson	5	Transf	38 22 12	92		
9/2/43	7B	Blaine	4			5		
9/16/43	7a	"	4			5		
1/31/44	8B	"	4			5		
9/29/44	8a	"	4			5		
2/[illegible]/45	[illegible]	[illegible]	4					
2/23/45	[illegible]	[illegible]	4					
9/21/45			4	P.A		5		
6/26/46			4	P.A				
[illegible]					4025155			

H 208 RATING OF TEACHERS CUMULATIVE RECORD—SCHOOL DISTRICT OF PHILADELPHIA (OVER)

LAST NAME: KEILAN, FIRST NAME: HERMAN, INITIAL: ALBE[illegible]

DAY	PRESENT POSITION: GRADE SUBJECT OR POSITION	SCHOOL	SET	RATED FOR	NUMERICAL RATING: INS	SUB	COOP	TOTAL	RATING
9/30/49	Aux. Teacher	Gt. N. Mus	6	TRANS	35	231		75	Satisfactory
6-49	Gratis	Evening	4					S	S (Verified)
6-49			4					S	S
6-50			4					S	S
6-51			4					S	S (Verified)
6-52			4					S	S (Verified)
6-53			4					S	S (Verified)
11-30-53			4	Supervisor	42	34	17	80	Satisfactory

FORM S E N 208 — RATING OF TEACHERS CUMULATIVE RECORD — SCHOOL DISTRICT OF PHILADELPHIA (OVER)

RESOLUTION OF THE BOARD OF PUBLIC EDUCATION DATED JANUARY 7, 1954.

I hereby certify that the following is a true and correct copy of a resolution adopted by The Board of Public Education at a special meeting held on January 7, 1954:

Mr. Obermayer submitted the following:

WHEREAS, The Board of Public Education on November 25, 1953 preferred charges against Herman Beilan of incompetency and persistent and wilful violation of the school laws of this Commonwealth in violation of the Act of March 10, 1949, P. L. 30, as amended, based on the written charges of the Superintendent of Schools; and

WHEREAS, The Board of Public Education conducted a hearing at which Mr. Beilan was represented by counsel, and

WHEREAS, The Board of Public Education has given full, impartial and unbiased consideration thereof:

I therefore move that the charges against the said Herman Beilan have been sustained and that the said Herman Beilan be discharged as a professional employe.

On the adoption of the motion the yeas and nays were called and were as follows:

Yeas: Mr. Downs, Mr. FitzPatrick, Miss Golden, Mr. Greenberg, Mr. LaBrum, Mrs. Lewis, Mr. Loesch, Dr. Lucchesi, Mr. McDonough, Mr. Obermayer, Dr. Pollock, Mr. Swenson, Dr. Turner, Mr. Weinrott—14.

Nays: Mr. Saul, President—1.

The motion contained in the report was adopted. From the official minutes of The Board of Public Education.

ADD B. ANDERSON,
Secretary.

(Seal)

OPINION NO. 91 OF SUPERINTENDENT OF PUBLIC INSTRUCTION, COMMONWEALTH OF PENNSYLVANIA, AS TO BEILAN.

Herman A. Beilan has appealed his dismissal from employment as a professional employe in the School District of the City of Philadelphia. In accordance with Section 1122 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, the Board of Public Education of Philadelphia charged Mr. Beilan with incompetency and persistent and wilful violation of the school laws of the Commonwealth.

On June 25, 1952, during a personal interview with the appellant, Dr. Louis P. Hoyer, Superintendent, School District of the City of Philadelphia, informed appellant that he wished to ask him certain questions having an important bearing on his loyalty. At that time, Doctor Hoyer also asked appellant whether he was press director of the professional section of the Communist Political Association. Appellant informed Doctor Hoyer that he wanted the advice of counsel and would call Doctor Hoyer to arrange for a further appointment.

On October 14, 1952, at a second interview with Doctor Hoyer, appellant stated that he had obtained the advice of counsel, who said that appellant "would not legally be asked questions about political and religious beliefs and that there was no legal basis for asking these questions."

On November 18, 1953, appellant refused to answer questions as to his affiliations when asked by the sub-committee of the House Committee on Un-American Activities, and invoked the Fifth Amendment to the Federal Constitution as the basis for his refusal.

The questions raised in this appeal are identical to those considered by us in the case of Solomon Haas, also a professional employe of The School District of the City of Philadelphia (Opinion No. 90 of the Superintendent of Public Instruction, dated November 18, 1954), wherein we sustained the action of the Board and dismissed the appeal. It would serve no useful purpose here to repeat our reasons.

For the reasons specified in our Opinion in the case of Solomon Haas, we hold that the action of the Board of Public Education of the School District of the City of Philadelphia in dismissing Herman A. Beilan, the appellant, was proper.

This appeal is therefore dismissed and the following order entered.

Findings of Fact.

1. Appellant is a professional employe in the School District of the City of Philadelphia.

2. Appellant on June 25, 1952, was called for a personal interview by Dr. Louis P. Hoyer, Superintendent of Schools, and informed that Doctor Hoyer wished to ask him some questions having an important bearing on his loyalty. At that time, appellant stated that he refused to answer the questions and wished to seek the advice of legal counsel.

3. On October 14, 1952, appellant was again called before Doctor Hoyer for questioning and stated that he had obtained the advice of counsel, who said that appellant "would not legally be asked questions about political and religious beliefs and that there was no legal basis for asking these questions."

4. On November 18, 1953, appellant was called before the sub-committee of the House of Representa-

tives of the Congress of the United States Investigating Un-American Activities, and asked certain questions dealing with his loyalty to the Government of the United States. Appellant refused to answer these questions, invoking the Fifth Amendment to the Federal Constitution as the basis of his refusal.

5. On November 20, 1953, appellant was rated "unsatisfactory" as a professional employe, by Dr. Louis P. Hoyer, Superintendent of Schools of Philadelphia.

6. On November 23, 1953, Dr. Louis P. Hoyer, Superintendent of Schools of Philadelphia, sent appellant a detailed letter informing him that he was rated "unsatisfactory" as a result of his refusal to answer questions presented by him and by the subcommittee of the House of Representatives of the Congress of the United States Investigating Un-American Activities.

7. On November 25, 1953, the Board of Public Education preferred charges against the appellant on the grounds of incompetency and persistent and wilful violation of the School Laws of this Commonwealth, and after sending him a statement of charges, conducted a hearing in the matter on December 22, 1953.

8. As a result of such hearing the Board of Public Education determined on January 7, 1954, that the appellant be dismissed.

9. From the action of the Board of Public Education an appeal was filed with the Superintendent of Public Instruction on January 20, 1954.

10. No additional testimony was taken before the Superintendent of Public Instruction.

CONCLUSIONS OF LAW.

1. The notice given to appellant of his unsatisfactory rating was a sufficient compliance with the law.

2. Neither Section 1123 nor Section 1125 of the Public School Code of 1949, as amended, dealing with the matter of rating professional employes, requires that a copy of the actual rating card used in the rating of a professional employe, be forwarded to the professional employe when the rating is made. The official rating card of the Department of Public Instruction is but a guide in determining the rating of a professional employe. The forwarding of a detailed written statement of the unsatisfactory rating was a sufficient compliance with the law.

3. The rating of professional employes, which is the right, the discretion and the duty of superintendents of schools, is not limited to classroom performance.

4. A superintendent of schools is within his legal authority in asking proper questions of professional employes in the employ of his district, which questions relate to the fitness of such employes to continue to serve as teachers in the employ of the school district.

5. The "Pennsylvania Loyalty Act," the Act of December 22, 1951, P. L. 1726, in no way insulates a professional employe from being asked questions as to his loyalty, and said Act is not involved in the present proceeding.

6. A superintendent of schools is justified in rating a professional employe "unsatisfactory" when such employe refuses to answer proper questions re-

lating to his loyalty asked of him by the superintendent of schools.

7. The refusal to answer, referred to in conclusion No. 6 herein, constitutes "incompetency."

8. The refusal to answer, referred to in conclusion No. 6 herein, constitutes "persistent and wilful violation of the school laws of this Commonwealth."

9. A superintendent of schools is justified in rating a professional employe "unsatisfactory" when such professional employe refuses to answer questions put to him by a sub-committee of the House of Representatives of the Congress of the United States and invokes the Fifth Amendment to the Federal Constitution on the ground that truthful answers thereto would tend to incriminate him.

ADJUDICATION AND ORDER AS TO BEILAN.

And now, this twenty-second day of December, 1954, after hearing and argument and after reviewing all the testimony filed or taken in the hearing, the appeal of Herman A. Beilan from a decision of the Board of Public Education of the School District of the City of Philadelphia, Pennsylvania, alleging that the Board of Public Education improperly dismissed him as a professional employe, is hereby dismissed and the action of the Board of Public Education is affirmed.

By Francis B. Haas,
Superintendent of Public Instruction.

OPINION NO. 90 OF SUPERINTENDANT OF PUBLIC INSTRUCTION, COMMONWEALTH OF PENNSYLVANIA, AS TO HAAS.

November 18, 1954

Solomon Haas has appealed his dismssal from employment as a professional employe in the City of Philadelphia. In accordance with Section 1122 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, the Board of Public Education of Philadelphia (hereinafter called the Board), charged Haas with incompetency and persistent and wilful violation of the school laws of the Commonwealth.

The record reveals that on June 26, 1952, appellant, during an interview with Dr. Louis P. Hoyer, Superintendent of Schools, refused to answer certain questions as to his loyalty. Haas stated that he wished to consult counsel. At a second meeting on October 14, 1952, appellant, having consulted counsel, again refused to answer questions relating to loyalty. He had taken the Loyalty Oath,[1] and his position was that this oath "took care of everything before that time." Appellant further stated that "he did not propose to have here what happened in Germany."

Thereafter, in November, 1953, a sub-committee of the House Committee on Un-American Activities met in Philadelphia for the purpose of investigating communist activities in that city. Appellant, in response to a subpoena, appeared before the sub-committee on November 18, 1953. He stated that at that time he was not a member of the Communist Party. However, when asked whether he had ever been a member, he refused to answer on the ground of the

1. The Act of December 22, 1951, P. L. 1726, 65 P. S. Section 211 et seq.

Fifth Amendment to the Constitution of the United States. The appellant was asked other questions by counsel for the sub-committee, relating to membership in the party and various communist front organizations, as well as attendance at meetings and picket lines. In each instance, Haas invoked the Fifth Amendment.

On the basis of Haas' refusal to answer questions relating to loyalty asked by Dr. Hoyer on June 26, 1952 and October 14, 1952, and his refusal to answer questions dealing with loyalty before the sub-committee upon recommendation by Dr. Hoyer, the Board, on November 25, 1953, preferred the charges against Haas to which reference has heretofore been made. Appellant received a statement of the charges, and on December 19, 1953, he was given a hearing before the Board. Thereafter, the Board found that the charges had been proved and, on January 7, 1954, Solomon Haas was dismissed. This appeal followed.

The important question presented for our determination is whether appellant's refusals, on the three occasions mentioned, to answer questions relating to loyalty, constitute incompetency and persistent and wilful violation of the school laws. This, of course, involves a consideration of the authority of Dr. Hoyer to ask the questions, and the effect of invoking the Fifth Amendment before a sub-committee of the Congress of the United States.

It was settled in Pennsylvania by the case of ALBERT APPEAL, 372 Pa. 13 (1952), that a communist or any person who advocates or participates in subversive doctrines cannot teach in the public school system. Mr. Chief Justice Stern, speaking for the Supreme Court, there said, at page 19:

> ". . . In short, it is essential, in order to protect our children from treacherous influences,

> that persons who advocate or participate in subversive doctrines should not be employed, or if employed should not be retained, as teachers in our public schools, and any teacher dismissed for such a reason cannot properly claim that any constitutional or legal right is thereby violated."

See also, the Act of December 21, 1951, P. L. 1712, 18 P. S. Section 3811.

To carry out the mandate of Article 10, Section 1 of the Pennsylvania Constitution that there be maintained a "thorough and efficient system of public schools," the appointment of superintendents is provided for in the public school system. The duties of such individuals include the determination of the fitness of the professional employes. See Section 1123 of the Public School Code of 1949, as amended by the Act of August 10, 1951, P. L. 1157, Section 1, 24 P. S. Section 11-1123 (P. P.).

As soon as Dr. Hoyer, as District Superintendent, came into possession of information concerning the loyalty of appellant, it was in our judgment his right, indeed, his solemn duty to inquire of appellant as to the truth or falsity of this information. Because of the important nature of this information, Dr. Hoyer chose to make the necessary inquiry himself. If appellant had cooperated and it was determined the information was false, it would then have been Dr. Hoyer's duty to protect this teacher from false accusation. Appellant, however, refused to cooperate and instead became insubordinate in that "he did not propose to have here what happened in Germany."

The fact that appellant took the Loyalty Oath in no way insulates him from inquiry relative to past conduct. Dr. Hoyer apparrently possessed information relating to past subversive activity or association

with subversive organizations by appellant. Assuming that such information was true, and assuming further that appellant's participation in subversive activities continued at least until the day of the oath, it is obvious that the inquiry as to past activity and association is relevant to determine if the activity or association has stopped and, if so, when and under what circumstances.

The Supreme Court of the United States, in a similar situation, has said:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. . . ." (Garner v. Board of Public Works of Los Angeles, 341 U. S. 716 (1951))

It has been held repeatedly that the term "incompetency," as used in the Public School Code, is not limited to classroom performance alone: HOROSKO v. MT. PLEASANT TWP. SCHOOL DISTRICT et al., 335 Pa. 369; BROWN'S CASE, 151 Pa. Superior Ct. 522; and WEST MAHANOY TWP. SCHOOL DIST. v. KELLY, 156 Pa. Superior Ct. 601.

It is our opinion that the settled contempt of Solomon Haas for the authority of the Superintendent of Schools seriously reflects upon his qualifications as a teacher. We fully agree with the sentiments of Dr. Hoyer contained in the testimony before the Board of Public Education as a reason for the unsatisfactory rating given to Haas:

"The question of competency of a teacher has many implications. Of course, there is the question of his technical skill in handling the work in the classroom. But there are a great many other matters that have to deal with personality, character, that are as important in some respects, I think even more important, than technical skill on the part of a teacher.

'I felt that in this instance Mr. Haas did not show the frankness, the candor, the kind of intellectual honesty that I think a teacher is bound to show in connection with his work. This was true on both occasions when he came into my office.

"The influence of a teacher in the classroom is perhaps greatest through the force of his example, through the kind of person that he appears to the children to be. And when we are dealing in an area that is as extensive as the area of a classroom, these matters assume tremendous importance. I therefore feel that a teacher who cannot deal with his professional superior on a basis of candor and frankness has a very serious defect in his qualifications as a teacher and I, therefore, consider him incompetent to be a teacher."

Since the questions which Dr. Hoyer desired to ask appellant related to his loyalty, his position is in accord with that adopted by the Supreme Court of the United States in the case of ADLER v. BOARD OF EDUCATION OF THE CITY OF NEW YORK, 342 U. S. 485, wherein it was said at page 493:

". . . A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It

must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."

Under the circumstances, we find that Haas' conduct before the Superintendent on two occasions constitutes incompetency within the meaning of the Public School Code. Cf., AMBRIDGE BOROUGH SCHOOL DISTRICT v. SNYDER, 346 Pa. 103; and GANAPOSKI'S CASE, 332 Pa. 103.

Appellant has raised the question whether he was given notice of the unsatisfactory rating in compliance with the Tenure Law, in that he did not receive a copy of the rating card.

We interpret Sections 1123 and 1125 of Public School Code of 1949 to require only that a copy of the rating or results of the computation be sent to the employe. A copy of the rating card need not be forwarded to the employe. In this particular case, the detailed letter which Dr. Hoyer sent to the employe, setting forth his reasons for the unsatisfactory rating, was much more informative than would have been a copy of the rating card itself. Since the purpose of

the law is obviously to inform the teacher that an unsatisfactory rating has been placed on record against him, the Board of Public Education, in this case, has complied with the rating procedure prescribed by the Code. See MULHOLLEN APPEAL, 155 Pa. Superior Ct. 587.

We also sustain the finding of the Board of Public Education that Haas' conduct constituted persistent and wilful violation of the school laws of the Commonwealth. Appellant clearly indicated that under no circumstances would he answer the questions put to him by Dr. Hoyer either then, or at any future time. Since we firmly believe that the school laws imposed a duty upon appellant to answer these questions, it follows that his repeated refusal to do so constitutes persistent and wilful violation.

Even if the interviews with Dr. Hoyer had never taken place; we believe another and most compelling reason exists for sustaining the dismissal of this employe—his refusal to answer questions propounded by a duly constituted sub-committee of the Congress of the United States.

The astonishing argument is made in appellant's brief that he "by his own violation did not flaunt his conduct before the public." The committee is blamed for appellant's plight in that it called for his testimony in public session and thus caused appellant to refuse to answer. Such an argument is preposterous. The simple facts are that appellant was asked by a lawful body, questions based upon sworn testimony which, if true, seriously reflect upon appellant's responsibilities, not only as a teacher but as a citizen. Appellant refused to answer these questions because a truthful answer thereto might tend to incriminate him. At the hearing before the Board he reaffirmed this position.

No one disputes appellant's right under the United States Constitution to invoke the Fifth Amendment and refuse to testify as to possible communistic affiliations. However, when a public school teacher pulls down this cloak of immunity, in our judgment his employer would be most remiss in his obligation to American children and their parents if he did not at once remove such teacher from the classroom. We are not swayed by arguments that no sanction should attach to the teacher who so deports himself. By all the concepts of logic and reason the teacher admits that he has done something for which he might be prosecuted criminally. We repeat, this appellant admitted at the hearing before the Board that a truthful answer to the committee's question would incriminate him.[2]

It is fundamental that while a person has a constitutional right to refuse to testify, such person does not have a right to public employment as a school teacher, policeman or in any other capacity. An exercise of the right may protect a person from criminal prosecution, but it does not prevent the revocation of a privilege by the State in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence: ADLER v. BOARD OF EDUCATION OF THE CITY OF NEW YORK, supra.

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2. "MR. RHOADS: Would the stenographer repeat that question. I want no equivocation from you on that, Mr. Haas.

"(The question was repeated by the stenographer as follows: And did you, when you took the benefit of the Fifth Amendment on November 18, 1953, before the House Un-American Activities Committee in Philadelphia, believe that if you answered truthfully the questions which were presented to you by that Committee, that your answers would incriminate you?)

"THE WITNESS: The answer is yes. However, I should like to add the following: First, here is a very serious question of the use of the First Amendment, even though I used the Fifth Amendment. There is the right to free association. I don't recall exactly what the amendment is pertaining to the ability to read different types of material so as to make up and formulate a broad picture of a situation which is necessary as a teacher. I believe it is the First Amendment. . . ." (N.T. 82)

The courts have frequently considered the question of the relationship of the Fifth Amendment to public employment. Justice Holmes once said on this point:

> ". . . The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. . . ." (McAuliffe v. Mayor of the City of New Bedford, 155 Mass. 216, 29 N. E. 517-518).

In SCHOLL v. BELL, 125 Ky. 750, 102 S. W. 248, 261-262, the following very pertinent observations are made:

> "The testimony shows many outrages and crimes done by the police, and yet, when these men were placed on the witness stand and interrogated as to what they knew, they invariably sheltered under the law forbidding self-incrimination; and, when the question as to whether the witness should or should not be compelled to answer was certified to the chancellors, the witnesses were always protected by the ruling. Assuming the ruling to be correct, the conclusion which seems to have been drawn as to the innocence of the officers is not justified. The principle under discussion is a rule of evidence, to protect the witness from criminal prosecution or public exposure to shame because of his own testimony. It is a rule of necessity, beyond which it should not be extended. Its use should not be considered as affording the witness a certificate of good character. Here were police officers being interrogated as to existence of crimes

they were paid to prevent, if possible; if not, to expose and punish afterwards, and yet they one and all refused to answer 'under adviceof counsel.' Suppose a secret murder had been committed, and the police on that beat, when asked about it, should say, 'I decline to answer for fear of incriminating myself.' This, under the rule invoked, would protect the witness from answering; but how long would it justify his retention on the roll of the police? What would be thought of those who left the public safety in his hands longer than it would require to discharge him? Suppose a bank had been robbed, and the bookkeeper, the teller, and cashier, when interrogated, should say, 'I decline to answer under advice of counsel.' What would be thought of a board of directors who would afterwards leave the bank in the hands of such men? This is precisely the situation here. Peace officers, whose duty it was to prevent and expose crime, when called on to do so, sheltered under the rule against self-incrimination; and yet these men still wear the official uniform, still draw salaries from the public purse, and this is made possible only by the consent of those who are the apparent beneficiaries of their silence.''

The same general proposition of the failure of a public-employe to answer questions was considered by the Supreme Court of Pennsylvania, as it applies to policemen, in the case of SOUDER v. PHILADELPHIA et al., 305 Pa. 1, 156 Atl. 245, wherein a policeman had failed to answer questions. The Court there said at page 6:

''. . . It was essential in the proper discharge of his duties that he should comport himself as an officer in such manner that no act of wrongdoing should attach itself to him, to the end

that those who served under him should feel for him that respect which insures confidence and obedience. As such an officer in such a station he should have been keen to see that no taint of evil doing attached itself to him and when charges were made, reflecting upon his honesty and integrity, that they were met with denial and answering proofs of no delinquencies. He should have held himself above suspicion. Instead of so doing, when charges of the gravest nature were brought against him by the grand inquest of the county, he answered before them in a way not to establish his freedom from wrong by full explanation, but in a manner calculated to confirm his complicity in crime, and, when summoned by his superior on specific charges before the tribunal charged by the law with the duty of inquiring into them, he answered not at all. This in itself was conduct unbecoming an officer."

In a very recent case, FAXON v. SCHOOL COMMITTEE OF BOSTON, 120 N. E. 2d 772, the Supreme Court of Massachusetts sustained the dismissal of a teacher upon grounds identical with those here presented. It was there said at page 774:

". . . We do not believe that dismissal of a teacher for pleading self incrimination before a Senate committee when asked about affiliation with the Communist Party can be held by the courts to be arbitrary, irrational, unreasonable, or irrelevant to the task of the school committee. The responsibility for determining grounds for dismissal rests primarily with the school committee and not with the court. Refusal to testify does not prove guilt and no inference of guilt can be drawn from it in a criminal case. In re Opinion of the Justices,

300 Mass. 620, 15 N. E. 2d 662. But the question here is not one of guilt or innocence. **It is a question of administration by a public board in the public interest.** Neither the school committee nor the court exists in a vacuum. Neither can profess ignorance of the currents of opinion which sway great masses of the people. It cannot be doubted that multitudes of people in this community regard with abhorrence the Communist Party and communism as that term is generally understood. It is not for this court to say why this is so or whether this feeling has gone too far or not far enough. It is sufficient for us that the feeling exists. Nothing the court can do or say will prevent the public from drawing its own inferences from refusals to testify. It is apparent that a school teacher has extensive and peculiar opportunity to impress his attitude and views upon pupils in his charge. It was the petitioner's statutory duty to impress upon them 'love of their country.'[3] . . . Yet some of the questions which the petitioner declined to answer bore directly upon the recruiting of students for communism. The school committee could find that a great many parents and others would be seriously disturbed if the petitioner were allowed to continue teaching, and that this would undermine public confidence and react unfavorably upon the school system. Considering the position of the petitioner entirely apart from any question of fault on his part and as if he had merely suffered some misfortune, such as a terribly disfiguring personal injury, **the best interests of the schools are paramount, and we cannot say that the school committee exceeded its powers.**" (Emphasis supplied.)

3. Cf., Sections 1511 and 1515 of the Public School Code of 1949, 24 P. S. Sections 15-1511 and 15-1515.

Much has been written concerning the lack of civic responsibility on the part of a teacher who invokes the Fifth Amendment. See Hook, "The Fifth Amendment —A Moral Issue," New York Times Magazine, November 1, 1953; Reutter, "The School Administrator and Subversive Activities," Columbia University, New York, 1951, but we will confine our comments by quoting from the case of INTILLE v. HOYER, 88 D. & C. 512 (Philadelphia County), which involved a teacher who was suspended for the same reasons as appellant. The court there said at pages 513-515:

> "Plaintiff was suspended on the ground that she had shown a lack of fitness to be a teacher in displaying conduct unbecoming her professional status in that she had failed to answer questions which in good conscience she should have been willing to answer candidly as to any affiliation with subversive organizations.
>
> "Since this ground is not enumerated in the section of the statute set forth above, plaintiff concludes that the suspension is improper and therefore merits the intervention of this court.
>
> "But the act does not lend itself to the tortured construction advanced by plaintiff. Because a teacher passes certain qualifying grades, she is not automatically so secure in her position that if she commits some act detrimental to society or to the children placed in her charge, the superintendent of schools is powerless to dismiss the teacher pending a final hearing by the board of education.
>
> * * *
>
> "Certainly the refusal of plaintiff to answer questions of a duly constituted committee of our Congress is a dreadful example for a teacher to set

for her pupils. Whether plaintiff is a subversive or not, such wretched conduct before a committee of the highest legislative branch of our Republic, can only foster in the impressionable children under her tutelage, a settled contempt and arrogance for our country and its lawmakers."

Appellant's conduct before the sub-committee of the House of Representatives of the Congress of the United States Investigating Un-American Activities, fully justifies the finding of incompetency by the Board of Public Education.

For the foregoing reasons we hold that the action of the Board of Public Education of the School District of the City of Philadelphia, in dismissing appellant was proper. This appeal is therefore dismissed and the following order entered.

FINDINGS OF FACT.

1. Appellant is a professional employe in the School District of the City of Philadelphia.

2. Appellant on June 26, 1952, was called for a personal interview by Dr. Louis P. Hoyer, Superintendent of Schools, and informed that Doctor Hoyer wished to ask him some questions having an important bearing on his loyalty. At that time, appellant stated that he refused to answer the questions and wished to seek the advice of legal counsel.

3. On October 14, 1952, appellant was again called before Doctor Hoyer for questioning and stated that upon advice of legal counsel he refused to answer Doctor Hoyer's questions.

4. On November 18, 1953, appellant was called before the sub-committee of the House of Representatives of the Congress of the United States Investigat-

ing Un-American Activities, and asked certain questions dealing with his loyalty to the Government of the United States. Appellant refused to answer these questions, invoking the Fifth Amendment to the Federal Constitution as the basis of his refusal.

5. On November 20, 1953, appellant was rated "unsatisfactory" as a professional employe, by Dr. Louis P. Hoyer, Superintendent of Schools of Philadelphia.

6. On November 24, 1953, Dr. Louis P. Hoyer, Superintendent of Schools of Philadelphia, sent appellant a detailed letter informing him that he was rated "unsatisfactory" as a result of his refusal to answer questions presented by him and by the sub-committee of the House of Representatives of the Congress of the United States Investigating Un-American Activities.

7. On November 25, 1953, the Board of Public Education preferred charges against the appellant on the grounds of incompetency and persistent and wilful violation of the School Laws of this Commonwealth, and after sending him a statement of charges, conducted a hearing in the matter on December 19, 1953.

8. As a result of such hearing the Board of Public Education determined on January 7, 1954, that the appellant be dismissed.

9. From the action of the Board of Public Education an appeal was filed with the Superintendent of Public Instruction on February 4, 1954.

10. No additional testimony was taken before the Superintendent of Public Instruction.

CONCLUSIONS OF LAW.

1. The notice given to appellant of his unsatisfactory rating was a sufficient compliance with the law.

2. Neither Section 1123 nor Section 1125 of the Public School Code of 1949, as amended, dealing with the matter of rating professional employes, requires that a copy of the actual rating card used in the rating of a professional employe, be forwarded to the professional employe when the rating is made. The official rating card of the Department of Public Instruction is but a guide in determining the rating of a professional employe. The forwarding of a detailed written statement of the unsatisfactory rating was a sufficient compliance with the law.

3. The rating of professional employes, which is the right, the discretion and the duty of superintendents of schools, is not limited to classroom performance.

4. A superintendent of schools is within his legal authority in asking proper questions of professional employes in the employ of his district, which questions relate to the fitness of such employes to continue to serve as teachers in the employ of the school district.

5. The "Pennsylvania Loyalty Act," the Act of December 22, 1951; P. L. 1726, in no way insulates a professional employe from being asked questions as to his loyalty, and said Act is not involved in the present proceeding.

6. A superintendent of schools is justified in rating a professional employe "unsatisfactory" when such employe refuses to answer proper questions relating to his loyalty asked of him by the superintendent of schools.

7. The refusal to answer referred to in conclusion No. 6 herein, constitutes "incompetency."

8. The refusal to answer referred to in conclusion No. 6 herein, constitutes "persistent and wilful violation of the school laws of this Commonwealth."

9. A superintendent of schools is justified in rating a professional employe "unsatisfactory" when such professional employe refuses to answer questions put to him by a sub-committee of the House of Representatives of the Congress of the United States and invokes the Fifth Amendment to the Federal Constitution on the ground that truthful answers thereto would tend to incriminate him.

ADJUDICATION AND ORDER AS TO HAAS.

And now, this eighteenth day of November, 1954, after hearing and argument and after reviewing all the testimony filed or taken in the hearing, the appeal of Solomon Haas from a decision of the Board of Public Education of the School District of the City of Philadelphia, Pennsylvania, alleging that the Board of Public Education improperly dismissed him as a professional employe, is hereby dismissed and the action of the Board of Public Education is affirmed.

By Francis B. Haas,
Superintendent of Public Instruction.

APPEAL TO COURT OF COMMON PLEAS.

HERMAN A. BEILAN appeals from the adjudication of the Superintendent of Public Instruction, made on the 22nd day of December, 1954, affirming Appellant's dismissal by the Board of Public Education of the School District of Philadelphia, dated January 7, 1954. This appeal is taken pursuant to Section 1132 of the Public School Code of 1949 as amended by the Act of 1951, Sept. 26, P. L. 1448, Sec. 1.

JOHN ROGERS CARROLL,
Attorney for Appellant.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

HERMAN A. BEILAN, being duly sworn, deposes and says that this appeal is not taken for the purpose of delay, but because Appellant believes he has suffered injustice by the adjudication appealed from.

HERMAN A. BEILAN.

Sworn to and subscribed before me this day of January, 1955.

MARTHA A. BAU,
Notary Public.

APPELLANT'S EXCEPTIONS TO ADJUDICATION OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

And Now, this 13th day of January, 1955, Herman A. Beilan by his attorney, John Rogers Carroll, excepts to the adjudication of the Superintendent of Public Instruction in the above-entitled matter as follows:

1. The adjudication is erroneous in holding that, as a matter of fact the appellant refused to answer any question asked by the Superintendent of Schools.

2. The adjudication is erroneous in holding that, without a charge alleging a refusal to answer questions asked by the Superintendent of Schools, appellant could be dismissed for such a refusal.

3. The adjudication is erroneous in holding that a refusal to answer questions pertaining to religious or political beliefs provides any ground for the dismissal of a professional employee.

4. The adjudication is erroneous in holding that a Superintendent of Schools has the right to compel answers to questions relating to the loyalty of a professional employee to the government of the United States on pain of dismissal.

5. The adjudication is erroneous in holding that the Act of December 22, 1951, P. L. 1726 (The Pennsylvania Loyalty Act) is not the exclusive method of inquiry into the loyalty of professional employees of a School District.

6. The adjudication is erroneous in holding that a refusal to answer questions relating to appellant's alleged membership in the Communist Party of the

United States at a time prior to the enactment of the Act of December 22, 1951, P. L. 1726, is either conclusive proof or some evidence of "incompetency" as that term is defined in § 1123 of the School Code (as amended by the Act of 1951, August 10, P. L. 1157 §1).

7. The adjudication is erroneous in holding that a refusal to answer questions relating to appellant's alleged membership in the Communist Party of the United States at a time prior to the enactment of the Act of December 22, 1951, P. L. 1726 is either, in itself, a violation of the school laws of the Commonwealth of Pennsylvania or is some evidence of such violation.

8. The adjudication is erroneous in holding that a professional employee of a School District may be dismissed upon a charge which simply alleges "violation of the school laws", without specification or particularization of any provision of the School Laws or any regulation pursuant thereto. Such holding violates, not only the School Laws themselves, but also the Due Process provision of Article I, § 9 of the Constitution of the Commonwealth and the Due Process provision of the 14th Amendment to the Constitution of the United States.

9. The adjudication is erroneous in holding that there is any evidence in this record of incompetency on the part of the appellant.

10. The adjudication is erroneous in holding that a Superintendent of Schools has the power, simply by asking a question of a professional employee which question pertains to his competency, to place upon the said employee the burden of disproving a charge of incompetency at a subsequent hearing before the Board of Education.

11. The adjudication is erroneous in holding that an action of a professional employee, occurring in an

academic year for which, after the action has been brought to the attention of the Superintendent of Schools, the professional employee was rated "satisfactory" on the rating cards approved by the School District of Philadelphia and the Department of Education of the Commonwealth by the said Superintendent, may, in a subsequent academic year, be used as a basis for dismissal of the said employee, either upon the ground of incompetency or that of wilful and persistent violation of the School Laws of the Commonwealth.

12. The adjudication is erroneous in holding that a single refusal to answer a single question asked by the Superintendent of Schools can amount to "wilful and persistent violation of the school laws".

13. The adjudication is erroneous in holding that a refusal to answer questions asked by the Superintendent of Schools relating to a past association of a professional employee, which association, if it existed, was lawful at that time under both the laws of the Commonwealth and of the United States. Such holding violates not only the School Laws but also the Due Process provisions of Article I, § 9 of the Constitution of the Commonwealth and of the Fourteenth Amendment to the Constitution of the United States, as well as Article I, § 4 of the Penna. Constitution.

14. The adjudication is erroneous in holding that, without specific and clearly defined authority in the statutes of the Commonwealth or valid regulations issued pursuant thereto, a professional employee of a School District may be dismissed for refusal to answer questions of the Superintendent of Schools relation to his associations or beliefs, past or present. Such holding violates the School Code of the Commonwealth, the Due Process provision of Article I, § 9 of

the Constitution of the Commonwealth and the Due Process provision of the Fourteenth Amendment to the Constitution of the United States, as well as Article I, § 4 of the Constitution of the Commonwealth.

15. The adjudication is erroneous in holding that a refusal to answer questions of a committee of the House of Representatives of the United States upon the ground of possible self-incrimination under the Fifth Amendment to the Constitution of the United States is incompetency as defined in § 1123 of the School Code of 1949 as amended, *op. cit.*, or evidence thereof. Such holding violates the School Code of the Commonwealth and the Due Process provisions of Article I, § 9 of the Constitution of the Commonwealth and the Fourteenth Amendment of the Constitution of the United States as well as the supremacy clause of Article 6, cl. 2 of the Constitution of the United States.

16. The adjudication is erroneous in holding that a proper invocation of rights granted by the Constitution of the United States is a "persistent and wilful violation of the school laws of the Commonwealth".

17. The adjudication is erroneous in holding that there is in this record, any evidence of any violation of the school laws of the Commonwealth, wilful, persistent, or otherwise.

18. The adjudication is erroneous in holding that a state has the right, consistent with the Due Process provision of the Fourteenth Amendment to the Constitution of the United States and the equal protection clause thereof to impose a penalty upon a citizen's exercise of a right granted by the Fifth Amendment to the Constitution of the United States by depriving the said citizens of public employment and the right thereto.

19. The adjudication is erroneous in holding that the use of the Fifth Amendment privilege not to be a witness against oneself is evidence of guilt of the crime which may be suggested by the question one refuses to answer. Such holding violates the due process provision of Article I, § 9 of the Constitution of the Commonwealth, the Due Process provision of the Fourteenth Amendment to the Constitution of the United States, the Equal Protection clause thereof, and the supremacy clause of the second clause of Article 6 of the Constitution of the United States.

20. The adjudication is erroneous in holding that the proper exercise of the aforesaid Federal right against self-incrimination is a breach of the civic responsibility of a professional employee of a School District and that any breach of civic responsibility is a ground of dismissal under the school laws of the Commonwealth. Such holding violates the State and Federal Due Process provisions referred to above as well as the aforementioned Supremacy clause of the Federal Constitution.

21. The adjudication is erroneous in holding that without specific statutory authority for dismissal of a professional employee because of his exercise of rights under the Fifth Amendment in a federal proceeding, such a dismissal may be effected consistently with the aforementioned State and Federal Constitutional provisions.

22. The adjudication is erroneous in holding that the evidence in this record supports the findings and conclusions of the Board of Public Education of the School District of Philadelphia.

Respectfully submitted,

/s/ J. R. C.,
/s/ JOHN ROGERS CARROLL,
Attorney for Appellant.

OPINION OF COURT OF COMMON PLEAS.

Before Bok, *P. J.*, and Flood and Levinthal, *JJ.*

The Board of Education of the School District of Philadelphia dismissed Herman A. Beilan, a High School teacher of English, on the alleged grounds of "incompetency" and of "persistent and wilful violation of the school laws". He appealed to the Superintendent of Public Instruction of the Commonwealth, who affirmed the dismissal. He now appeals to this court, under the School Code: Act of March 10, 1949, P. L. 30, Art. XI, Sec. 1132, as amended: 24 P. S. Sec. 11-1132.

Appellant, who had been a public school teacher since 1930, was asked to report for an interview with Dr. Louis P. Hoyer, Superintendent of Schools, on June 25, 1952. Dr. Hoyer asked appellant whether he had been in 1944 the press director of the professional section of the Communist Political Association. Appellant, without answering, said that he wished to consult counsel, and Dr. Hoyer agreed. In a second interview on October 14, 1952, Dr. Hoyer asked appellant if he was ready to discuss the information in Dr. Hoyer's possession. Appellant replied that after consulting counsel his position was that he could not legally be asked questions about his political or religious beliefs. The interview ended by Dr. Hoyer saying that it was a serious matter, and that failure to answer might lead to appellant's dismissal.

No action was taken by the Superintendent of Schools for thirteen months after the second interview. On November 18, 1953, appellant was subpoenaed to appear before the Committee on Un-American Activities of the House of Representatives, then meeting in Philadelphia. He appeared and testified

as to his educational and employment background. When asked by the Congressional Committee whether he had been associated with organizations connected with the Communist Party, between 1943 and 1949, Mr. Beilan pleaded the privilege of the Fifth Amendment of the Constitution. He refused to answer all questions concerning past associations with Communist activities, and he was excused by the Committee.

Soon after the close of the Committee hearings, Dr. Hoyer suspended Mr. Beilan and preferred formal charges of incompetency and of wilful and persistent violation of the school laws. A hearing followed at which the only evidence presented against appellant related to his refusal to answer Dr. Hoyer's question as to his past political activity and also the record of his testimony before the Congressional Committee.

The Board of Education, by resolution approved by a two-thirds vote of all its members, and opposed by Mr. Saul, its president for many years, dismissed appellant on the grounds charged against him. It is contended by appellant that his removal was improper and illegal, and that the action of the Superintendent of Public Instruction in affirming the dismissal should be reversed.

Although we do not condone appellant's misguided secretiveness and lack of candor, we are convinced that the record in this case discloses basic error on the part of the school authorities in their conception of the scope, and in their interpretation of the provisions, of the Teachers' Tenure Act, under which they purported to act.

At the outset, it should be emphasized that the legislature unquestionably has the power to authorize the removal of school teachers because of subversive activities or associations. The Commonwealth's un-

compromising position with regard to the employment of teachers who are Communists or who advocate or participate in subversive doctrines is well known and universally approved. Mr. Chief Justice Stern, speaking for the Supreme Court, in the case of *Albert Appeal*, 372 Pa. 13 (1952), cogently declared, at p. 19:

> ". . . In short, it is essential, in order to protect our children from treacherous influences, that persons who advocate or participate in subversive doctrines should not be employed, or if employed should not be retained, as teachers in our public schools, and any teacher dismissed *for such a reason* cannot properly claim that any constitutional or legal right is thereby violated." (Emphasis supplied.)

Appellant was not dismissed on the ground that he advocates or participates in subversive doctrines. His contract of employment was terminated on the alleged grounds of incompetency as a teacher and of wilful and persistent violation of the school laws.

An examination of the record makes it abundantly clear that the proceedings before the Board of Education were actually concerned solely with the question of appellant's suspected disloyalty. Such conclusion results from a consideration of these facts: The sole question asked by the Superintendent of Schools at the initial interview in 1952 concerned appellant's alleged affiliation in 1944 with the Communist Political Association, a group now deemed subversive. Furthermore, the entire transcript of appellant's testimony before the Un-American Activities Committee, a Congressional Committee charged with investigating subversive activities, was admitted into the record of the hearing before the Board of Education for consideration by that body. Lastly, the Congressional Committee hearing occurred against a background of

a nation-wide effort to expel all subversives from positions of public service.

It is upon the Teachers' Tenure Act that the Board of Education relies for its authority to dismiss appellant. It should be noted, as the late Chief Justice Kephart pointed out, that the Tenure Act places "emphatic limitations" on the removal of teachers, and that its purpose is "to preserve the system of employment in the educational field free from any interference." *Teachers' Tenure Act Cases*, 329 Pa. 213, at p. 222 (1938).

Prior to 1949, the Tenure Act enumerated the following seven grounds for terminating a teacher's contract of employment: "immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, and persistent and wilful violation of the school laws of this Commonwealth." Act of May 18, 1911, P. L. 309, Sec. 1205, as last amended by Act of June 20, 1939, P. L. 482, Sec. 2. In 1949 the Tenure Act was amended to include as an additional cause for dismissal "advocation of or participating in un-American or subversive doctrines." Act of March 10, 1949, P. L. 30, Sec. 1122. The passage of this amendment leads to the natural inference that prior thereto advocacy of or participating in un-American or subversive doctrines had not been covered by the Tenure Act. It is to be remembered that the case of *Albert Appeal*, supra, in which the dismissal of a subversive teacher was affirmed, was decided on the basis of the Tenure Act as thus amended, and that the Supreme Court expressly declared, at p. 18, that "the legislature can certainly prescribe qualifications for teachers in the public schools with respect not only to their academic attainments but also to their moral character and their loyalty to the state and federal governments."

In 1951 the legislature passed the Pennsylvania Loyalty Act, sometimes called the Pechan Act, which provides for the removal of subversives in all areas of public service. Act of December 22, 1951, P. L. 1726: 65 PS. Sec. 211. The constitutionality of the Loyalty Act was unequivocally upheld. Fitzgerald vs. City of Philadelphia, 376 Pa. 379 (1954). That statute prescribes the procedure whereby a teacher or other public servant may be dismissed if he is proved to be a subversive person. It is significant that by Section 16 of the Loyalty Act the 1949 amendment of the Teachers' Tenure Act, which added "advocation of or participating in un-American or subversive doctrines" as an eighth ground for dismissal, was specifically repealed.

By its passage of the Loyalty Act in 1951, and the repeal of the 1949 amendment of the Tenure Act, it is manifest that the legislature intended to deal with the matter of loyalty solely by the method of procedure provided in the Loyalty Act. This inference rests on common sense as well as on a well-established doctrine enunciated in an early statute of our Commonwealth, that where a remedy or method of procedure is provided by act of assembly, its provisions shall be strictly pursued and exclusively applied. Act of March 21, 1806, P. L. 538, 4 Sm. L. 326 Sec. 13; 45 PS. 158. See *Bartron vs. Northampton County*, 342 Pa. 163, 168 (1941); *Lewisburg Bridge Co. vs. Union County*, 232 Pa. 255, 264 (1911).

The Loyalty Act was passed after much debate in a climate of aroused public reaction to the alleged widespread employment of subversives in the teaching field and other public services. It contains a method of procedure which is intended to care effectively for the interests of all parties involved. The hearing before the Board of Education did not follow

the procedure outlined in the Loyalty Act, and the Board of Education explicitly declared that it was not proceeding under the Loyalty Act, but solely under the Tenure Act. Although the matter considered by the Board of Education bore only on the question of appellant's suspected disloyalty, the testimony presented at the hearing related merely to appellant's refusal to answer questions, and no attempt was made to prove that appellant was actually a Communist or otherwise disloyal. The Board made no finding that appellant was a subversive person, as it is required to do by Section 217 of the Loyalty Act, which reads as follows: ". . . If, after due hearing, it is determined by the appointing authority by a fair preponderance of the evidence that the person who has been so notified is a subversive person, as defined in the act, the person who has been so notified shall be discharged."

We are aware that "incompetency", as used in the Tenure Act, has a common and approved usage which embraces more than merely educational qualifications. *Horosko vs. Mt. Pleasant Township School District et al.*, 335 Pa. 369 (1939); Brown's Case, 151 Pa. Superior 522 (1943). However, it cannot seriously be argued, in the light of the legislative history herein reviewed, that the term "incompetency" includes an alleged disability based on a refusal to answer the Superintendent's query relating to a political association alleged to have occurred eight years prior to the interview. Appellant's refusal to answer that question was obviously not relevant to the issue of his present competency as a teacher. Had Dr. Hoyer seriously regarded appellant as incompetent because of his refusal to answer, he certainly would not have permitted seventeen months to elapse before suspending appellant. Undoubtedly it was appellant's appear-

ance before the Congressional Committee and his claim of privilege under the Fifth Amendment that precipitated the suspension and subsequent dismissal.

It is urged on behalf of appellee that a refusal by a teacher to answer questions *of any character* which the Superintendent of Schools may consider pertinent as affecting his teaching should warrant dismissal under the Teachers' Tenure Act. This broad position would undermine the essential purpose for which the Tenure Act was adopted, and would deprive teachers of any semblance of security in their employment.

As for the second charge of "willful and persistent violation of the school laws", we are unable to find any school law or regulation of the Board of Education which appellant has violated by his refusal to answer the question of the Superintendent or to testify before the Committee, nor has any such law or rule been suggested to us.

The legislature has by means of the Tenure Act and the Loyalty Act, respectively, designated the grounds for dismissal of a teacher. We do not intimate that the legislature lacks authority to enlarge and expand the causes for dismissal. It might, of course, have provided for the discharge of a teacher who refuses to answer questions relating to his associations with subversive political bodies. Indeed, in New York, where such prior legislation had been enacted, through a provision in the City Charter, a teacher's dismissal has been upheld. *Daniman vs. Board of Education of the City of New York*, 306 N. Y. 532, 119 N. E. 2d 373 (1954). The legislature of Pennsylvania, however, has not enacted such a statute, and it is of some significance that Senate Bill No. 94 of the 1953 Session and Senate Bill No. 22 of the 1955 Session, both of which were introduced by Senator Pechan,

the author of the Loyalty Act of 1951, and which provided for the removal of public servants who refuse to testify on constitutional grounds, have not been adopted.

Nor do we hold that the Board of Education may not properly promulgate a rule making it the duty of teachers to cooperate with proper investigatory bodies by answering all questions put to them as to their loyalty and declaring that teachers who violate such rule may be dismissed. In California, where such a regulation had been promulgated by the Board of Education, dismissal for its subsequent violation has also been upheld. *Board of Education of Los Angeles vs. Gerber*, Cal. Super. Ct. Dec. 2, 1953, 22 U. S. Law Week, 2286.

In the Massachusetts case of *Faxon vs. School Committee of Boston*, 331 Mass. 531, 120 N. E. 2d 772 (1954), the dismissal of a teacher "at discretion" was upheld for failure to testify before a United States Senate Committee as to his loyalty. It is to be noted that the Massachusetts statute provides that a teacher "at discretion" may be dismissed for "conduct unbecoming a teacher . . . or other good cause." Unlike our Tenure Act, the Massachusetts Act conferred upon the school authorities the power of removal of such teachers "in the most general terms", a power which may "be exercised whenever in the judgment of those to whom it is committed the public good for any cause requires it." See *Sheldon vs. Hopedale*, 276 Mass. 230, 177 N. E. 94 (1931), citing *Knowles vs. Boston*, 78 Mass. (12 Gray) 339.

No decision has been cited, nor have we been able to discover any case, where under a Tenure Act similar to ours a teacher's dismissal for refusal to answer questions as to his prior political associations has been judicially upheld. For us, as judges, under

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IN THE

Supreme Court of the United States

October Term, 1956.

No. 668

BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA

v.

HERMAN BEILAN,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

JOHN ROGERS CARROLL,
2015 Land Title Building,
Philadelphia 10, Penna.,

EDWIN P. ROME,
1529 Walnut Street,
Philadelphia 2, Penna.,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1956.

No.

BOARD OF PUBLIC EDUCATION,
SCHOOL DISTRICT OF PHILADELPHIA

v.

HERMAN BEILAN,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania reversing the judgment of Court of Common Pleas No. 6 of Philadelphia County which had declared invalid the dismissal of Petitioner by the Respondent Board because of his refusal to answer a question relating to alleged past Communist association.

Opinions Below.

The majority, concurring and dissenting opinions in the Supreme Court of Pennsylvania are reported at 386 Pa. 82; 125 Atl. (2nd) 327, and are appended hereto. No opinion was filed on the petition for reargument. The order denying that petition is appended hereto. The opinion of the Court of Common Pleas, as well as the opinions of the Superintendent of Public Instruction of the Commonwealth of Pennsylvania in this and the companion case of Haas and the resolution of the Board of Public Education, School District of Philadelphia are unreported and are included in the Record as printed for the Court below, nine copies of which have been filed herewith.

Jurisdiction.

The final judgment of the Supreme Court of Pennsylvania reversing the decision of the Court of Common Pleas was entered June 25, 1956. The Per Curiam Order denying Reargument was entered October 3, 1956. The time for filing this petition for writ of certiorari expires January 1, 1957. It is filed within the time.

The jurisdiction of this Court is invoked under Title 28 U. S. C. § 1257 (3).

Question Presented.

Is it a violation of the Due Process Clause of the Fourteenth Amendment for a state to dismiss a public school teacher as "incompetent" simply because of his refusal in 1953 to answer a question asked by the Superintendent of Schools about his membership in the Communist Political Association in 1944, where such association was lawful at the time it was alleged to exist, and where no hearing on the question of the teacher's loyalty is accorded him.

Constitutional and Statutory Provisions Involved.

Only the citations of the constitutional and statutory provisions are included here. The full text is printed in the Appendix hereto. The citations are as follows:

Due Process Clause
U. S. C., Const. Amendment 14.

Statutory Remedies Act
Act of 1806, March 21, P. L. 558, 4 Sm. L. 326, § 13; 46 Purdon's Pa. Stat. Ann. § 156.

Teachers' Tenure Act
Act of 1949, March 10, P. L. 30, art. XI, §§ 1122, 1123; 1949, May 9, P. L. 939, § 4; 24 Purdon's Pa. Stat. Ann. §§ 11-1122, 11-1123.

Pennsylvania Loyalty Act
Act of 1951, Dec. 22, P. L. 1726, §§ 3, 5, 6, 10, 15a; 65 Purdon's Pa. Stat. Ann. §§ 213, 215, 216, 220, 225a.

Statement of the Case.

Prior to his suspension on November 23, 1953, Petitioner had been a public school teacher in the School District of Philadelphia for twenty-three years. On June 25, 1952, in compliance with a written request by the Superintendent of Schools of Philadelphia, Petitioner reported to the Superintendent for an interview. The Superintendent "indicated to Mr. Beilan that I had some information that I felt bore on the question of his loyalty, and I wanted to know whether the information was correct." (Record 19a.) The Superintendent then asked Petitioner if he had been press director of the professional section of the Communist Political Association[1] in 1944.

Petitioner said he wished to consult with his counsel and the Superintendent ". . . indicated to him that that was entirely satisfactory to me." (Record 19a.)

On October 11, 1952, when Petitioner was again summoned, he told the Superintendent that he had been advised by counsel that he need not answer the proposed question. The Superintendent asked no further questions.

More than a year later, on November 18, 1953, Petitioner appeared under subpoena before a sub-committee of the Committee on Un-American Activities of the United States House of Representatives. Petitioner testified that he was not then a member of the Communist Party but invoked the Fifth Amendment when questioned about past associations. This plea was honored by the Committee.

One week later, on November 25, 1953, the Superintendent of Schools suspended Petitioner and approximately twenty-five others similarly situated, charging them with "incompetency" and "wilful and persistent violation

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1. The Communist Political Association as distinguished from the Communist Party of the United States has never been regarded as a subversive organization by the Federal Government or the Commonwealth of Pennsylvania, cf. Dennis v. United States, 341 U. S. 494, 497 n. 1.

of the school laws". On December 19, 1953, a hearing was held on those charges before the Board of Public Education.

The only evidence offered was Petitioner's plea of the Fifth Amendment and his refusal, on advice of counsel, to answer the Superintendent's question. Petitioner's position before the Board of Education was that the real issue and the Board's real interest was his loyalty and that the only legal procedure in Pennsylvania for an inquiry into and determination of a public school teacher's loyalty was by the exclusive and specifically designed provisions of the Pennsylvania Loyalty Act.[2] (Act of 1951, December 22, P. L. 1722.)

Following its hearing, the Board of Education, opposed only by its President of many years, Walter Biddle Saul, Esquire, dismissed Petitioner on the grounds charged. Thereafter, the State Superintendent of Public Instruction affirmed the action of the Board and Petitioner appealed to the Court of Common Pleas of Philadelphia County.

That Court unanimously reversed both the State Superintendent and the Board of Education. It held that since the Superintendent's inquiry (as the Superintendent had originally told Petitioner) concerned only loyalty, it should have been conducted under the Loyalty Act.

The Board of Education appealed to the Supreme Court of Pennsylvania. The Supreme Court heard argument on November 30, 1955, and thereafter ordered reargument on the constitutional questions and on June 25, 1956, filed its opinion reversing the Court of Common Pleas. Two of the six justices participating dissented in separate opinions and one concurred separately with reservations.

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2. Petitioner's counsel stated (Record 66a), "We earnestly invite the Board to begin, with respect to Mr. Beilan, proper, formal loyalty proceedings under the Pechan Act where it properly belongs and nowhere else." The suggestion in the majority opinion of the Supreme Court of Pennsylvania that Petitioner's counsel agreed that the procedure before the Board of Education was proper or adequate is incorrect.

Although two separate incidents were involved: Petitioner's plea of the Fifth Amendment before the Congressional Committee, and his refusal to answer the question of the Superintendent of Schools, the Supreme Court decided only the latter, and, in view of this Court's opinion in *Slochower v. Board of Higher Education of New York City*, 350 U. S. 551, declined to decide whether Petitioner could be dismissed on the former ground.

On July 6, 1956, Petitioner filed a petition for reargument which was denied, Per Curiam, on October 3, 1956. This petition followed.

Constitutional Issues as Raised in the State Proceedings.

Petitioner's main constitutional complaint throughout the proceedings below was that dismissal, merely for refusal to answer a question relating to alleged past subversive association, without a hearing on the real issue, under the exclusive provisions of the Pennsylvania Loyalty Act, violated the Due Process Clause of the Fourteenth Amendment.[3] The Board filed no opinion, but its decision clearly overruled this contention.

In his petition on appeal to the State Superintendent of Public Instruction (not included in the Record), Petitioner made the same complaint. That official, in his opinion in the companion case of *Haas* which was incorporated by reference in his opinion in Petitioner's case (cf. Record 77a), ruled against Petitioner (Record 83a, 84a). The Superintendent held that *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 covered the

3. Petitioner's counsel stated at the hearing before the Board of Education (Record 66a):

> "We would simply like to state to the Board that although we agree that there is this very narrow issue of refusal to answer questions, nevertheless, the undertone of this entire unhappy proceeding has had to deal with loyalty. Therefore, we intend to prevent, if possible, any evidence of it in this proceeding. We earnestly invite the Board to begin, with respect to Mr. Beilan, proper, formal loyalty proceedings under the Pechan Act where it properly belongs and nowhere else."

case. This part of his decision is printed in the Record at pages 83a, 84a.

On his appeal to the Court of Common Pleas, Petitioner specifically excepted to this ruling. Cf. Exceptions Nos. 13 and 14 (Record 101a, 102a).

The Court of Common Pleas ruled on the issue in its opinion as follows (Record 112a):

> "The procedure pursued by the school authorities was patently erroneous and the grounds upon which the dismissal was based are not supported by the record in the case. The school authorities obviously desired to dismiss appellant because they suspected him of disloyalty. Had the Loyalty Act been followed, appellant would have been entitled to the safeguards afforded by the provisions of that statute. The Tenure Act was utilized as an expedient short-cut. To this unauthorized procedure we dare not give our judicial sanction. We should be ever mindful of the sage observation of the Supreme Court of our land: 'The history of liberty has largely been the history of observance of procedural safeguards.' *McNabb v. United States*, 318 U. S. 332, at p. 349 (1943)."

On the appeal by the Board of Education to the Supreme Court of Pennsylvania, the only statement of questions permitted by the rules of that Court are those in the briefs of the respective parties, which are not matters of record. We may say, however, that the Board thus stated the questions in its brief (Appellant's Supplemental Brief, Summary of Argument):

> "The Board and the Superintendent have the right under the Constitution, to require the teachers to disclose past affiliations with subversive organizations."

> "There is no constitutional question raised by the dismissal of the teacher for refusal to answer the questions of the Superintendent."

Petitioner raised, inter alia, the following constitutional questions (Brief for Appellee, p. 9; Supplemental Brief for Appellee, pp. 1, 4):

> "B. Since the real issue in the case was the loyalty of the appellee the only proper procedure is under the Loyalty Act and since the dismissal was really upon the ground of disloyalty, the procedure used, which rules out evidence of loyalty, was a denial of due process of law."
>
> "1. Dismissal for refusal to answer questions relating to past Communist association violates the Fourteenth Amendment where the question makes no reference to the individual's knowledge of the subversive character of the organization involved."
>
> "2. Dismissal of a public school teacher for refusal to answer a question, asked by the Superintendent of Schools without statutory authority, violates the Due Process Clause and is an unconstitutional delegation of legislative power."

The majority opinion of the Supreme Court specifically overruled these contentions. Cf. Opinion of Mr. Justice Chidsey appended hereto p. 2a at 4a.

Mr. Justice Jones dissenting, specifically agreed with petitioner's constitutional contention.[4]

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4. ". . . The primary question here involved is,—By what legal procedure may a school board competently find the disqualifying factor which warrants the teacher's dismissal? It will hardly be disputed that the answer to that question is that it must be in a proceeding which complies with the requirements of procedural due process. The established tenure of a school teacher is a right of which he cannot be deprived, in circumstances reflecting on his loyalty, without due process of law: Wieman v. Updegraff, 344 U. S. 183.

. . .

". . . The learned court below had not the slightest difficulty in seeing through the gossamer with which the Board obscures the real basis for its dismissal of Beilan. It presumes to say that its action was wholly unrelated to any question of Beilan's loyalty. The

Mr. Justice Bell in his dissenting opinion, states:

". . . It seems to me evident that the Legislature of Pennsylvania has clearly provided that a person can be dismissed as a teacher for un-American activities or advocation of subversive doctrines only when the charge is made under the Loyalty Act and the appointing authority proves such charges, not by defendant's refusal to testify, but by a fair preponderance of the evidence."

Mr. Justice Musmanno in his opinion concurring with reservation also acknowledged the constitutional issue involved. Cf. Appendix p. 14a.

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court concluded, however, that 'the proceedings before the Board of Education were actually concerned solely with the question of (Beilan's) suspected disloyalty.' With that conclusion, I thoroughly agree."

REASONS FOR GRANTING THE WRIT.

1. The Issue Is One Which This Court Has Not Decided.

The majority opinion of the Supreme Court of Pennsylvania quotes the opinion of this Court in *Slochower v. Board of Higher Education of New York City*, 350 U. S. 551, 558, as follows:

> "'It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at "the property, affairs or government of the city, or . . . official conduct of city employees". In this respect the present case differs materially from Garner, where the city was attempting to elicit information necessary to determine the qualifications of its employees. . . .'" 386 Pa. 82 at pp. 93, 94.

The Supreme Court of Pennsylvania seized upon this dictum to evade the real import of the *Slochower* decision as well as *Wieman v. Updegraf*, 344 U. S. 183.

It appears that Pennsylvania has discovered an area not clearly decided by this Court's opinions of recent years on the rights of state public employees discharged for causes relating to Communist association, to wit: dismissal on the alleged ground of incompetency for refusal to answer the question of an administrative superior about past innocent membership in a lawful organization.

In *Adler v. Board of Education of the City of New York*, 342 U. S. 485, this Court determined that public school teachers could be dismissed on *proof* of subversive associations under New York's Feinberg Law which is substantially identical to the Pennsylvania Loyalty Act.

In *Gerende v. Board of Supervisors*, 341 U. S. 56 and *Garner v. Board of Public Works of Los Angeles*, 341 U. S.

716, this Court decided that public employees could lawfully be required to disclose whether or not they had been members of subversive organizations during a time when such membership was prohibited by law for public employees.

In *Wieman v. Updegraff, supra,* the Court limited the *Gerende* and *Garner* decisions by holding that a similar oath without a requirement of *scienter* offended the due process clause because it imposed a penalty upon possibly innocent membership.

In *Slochower v. Board of Higher Education, supra,* this Court held that a plea of the Fifth Amendment did not warrant automatic dismissal.

In the case at bar the only constitutional question which remains after the decision of the Pennsylvania Supreme Court is whether a public school teacher may be dismissed under the stigma of disloyalty without any evidence of disloyalty and without being permitted to prove his loyalty *simply because of his refusal to answer a single question relating to alleged past membership in a suspect organization at a time when such membership was innocent.*

As noted in the dissenting opinion of Mr. Justice (now Chief Justice) Jones, petitioner had taken the Pennsylvania Loyalty Oath in 1952 and the Communist Political Association was considered a lawful political party in Pennsylvania at least until 1951. In this latter aspect the case is similar to *Wieman.* It is also similar to *Slochower* in that the discharge was based solely upon failure to answer a question.

It differs from *Wieman* in that here the question was asked informally by the Superintendent of Schools and not in the form of an oath provided by statute. This difference leads to what the majority opinion in the Supreme Court of Pennsylvania suggests as the distinguishing possibility that petitioner would have been given an opportunity to exonerate himself in answer to further questions. It like-

wise differs from *Slochower* in that the Fifth Amendment is not involved.

Pennsylvania has discovered a loophole, as it were, in the protective armor which this Court has placed around the tenure rights of public employees. For these reasons petitioner believes that the case presents an heretofore undecided question.

2. The Question Presented Is Substantial.

This brings us to a consideration of the importance of the issue presented. It is important: first to the development of the law, i.e., clearly defining the constitutional limits of the rights of states and their employees in this field, a task which this Court has begun in the decisions cited above but which, in view of the present Pennsylvania decision, appears not to have been completed.

It is important, secondly, to teachers' tenure, an essential institution of democratic education.

It might seem at first blush that whether or not the people of a state wish to have school teachers insulated from the passing winds of politics and prejudice is rather a matter for the states than for this Court. In a sense this is so but the Court is not asked to decide that issue in this case. It is only asked to lay a constitutional floor under academic freedom. By this we mean that, where a state has granted statutory tenure to its teachers, that right may not be extinguished by a subterfuge as blatant as this one.

We do not propose to attempt in this petition to persuade the Court of the importance of tenure. Suffice it to say that Mr. Justice Clark's statement for the Court in *Wieman v. Updegraff* illustrates our position:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that that constitutional protection does extend to the public servant whose exclusion pursuant to a

statute is patently arbitrary or discriminatory." 344 U. S. 183, 192.

The protection which this Court has already given to teachers' tenure in *Wieman* and *Slochower* we do not seek to extend, but rather to clarify.

The basic issue of whether a public employee can be dismissed under the stigma of disloyalty without a hearing on his loyalty, upon the ground that he refused to answer a question about past association, we believe has already been decided. Cf. *Wieman* and *Slochower*, *supra*, and *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 624. But the factual distinctions between this case and the previous decisions of this Court show an open door to the evasion of those decisions, by disguising disloyalty as incompetency and substituting a refusal to answer for evidence. This is a door through which many other jurisdictions may follow Pennsylvania and thus the force of this Court's efforts in those cases will be lost. Petitioner suggests, therefore, that a part of the importance of the present question lies in the need to clarify those past decisions.

The Teachers' Tenure Act of Pennsylvania, when it was enacted in 1937, was regarded as a model tenure act and has been copied in many other jurisdictions. If Pennsylvania finds it so easy to evade, the other states may soon follow suit.

For these reasons we think that review of this case is important not only to the 25 companion cases awaiting decision in the Philadelphia Courts but also to the continued existence of academic freedom in every state.

3. The Pennsylvania Decision Is Not in Accord With Those of This Court.

The opinion of the Court of Common Pleas and the dissenting opinions in the Supreme Court of Pennsylvania suffice to demonstrate that this school teacher and his

companions were dismissed because it was suspected that they had been Communists, the protestations of the Board of Education to the contrary notwithstanding. This Court will readily see from the record—the charges and the factual setting in which they were laid, the televised visit of the congressional committee to Philadelphia summoning these teachers, the great public hue and cry to cleanse the schools of subversives, followed by the summary suspension of all of them indicates that the sole and consuming interest of the Board of Public Education of the School District of Philadelphia was in "subversion".[5]

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5. The following colloquy between the President of the Board and its Counsel is illustrative on this point (Record, 12a, 13a):

"MR. RHOADS: So far as this case is concerned, we are not delving into present or past loyalty.

MR. SAUL: You are not asking this Board in the presentation of these charges—you are not asking this Board to pass on the question of the loyalty of this teacher?

MR. RHOADS: I am not asking this Board in this proceeding or any other proceeding that I know of to pass upon the loyalty or disloyalty of this particular teacher. I am saying that the things which this teacher did in connection with this professional obligations were such as to result in incompetency sufficient to discharge the teacher under the School Code.

MR. SAUL: And are you saying to the Board now that in making our decision we are not to be influenced by any thoughts or any ideas that we have as to loyalty or disloyalty?

MR. RHOADS: I can't say what thoughts are going to influence you, Mr. President, or anybody. I am saying that these charges are not directed toward loyalty, and beyond that I couldn't go. I couldn't possibly answer your question.

MR. WEINROTT: I wonder whether Mr. Rhoads is on trial here or something?"

The deficiencies of this proceeding in terms of procedural due process are probably best shown in the following statement of counsel for the Board at petitioner's hearing (Record, 49a):

"And I don't purpose to have the record, if I can help it,—to have the record of these hearings find Dr. Hoyer, Brewster Rhoads or any member of this Board committed to some proceeding in accordance with the section of an act or something of that kind which my friend (Counsel for Petitioner) is trying to get."

The charge of "incompetency" is a sham. Petitioner was not only rated competent for 23 years before this happened but as a matter of fact the Court will see from the record that 10 days after his suspension he was rated competent by the principal of the school in which he taught (R. 55a, 56a).

The opinion of the Superintendent of Public Instruction (R. 76a, et seq.) with its emphasis on subversives in the school room also demonstrates that this was a loyalty and not an incompetency case. The majority opinion of the Supreme Court shows the same theme.

In view of all of this evidence we think the conclusion is inescapable that petitioner was dismissed because of suspected disloyalty and publicly disgraced on that ground without the hearing he deserved on that issue. We think that the import of this Court's decision in the *Slochower* case clearly requires that such a hearing be given and therefore we submit that the decision of the Supreme Court of Pennsylvania is not in accord with applicable decisions of this Court.

Respectfuly submitted,

John Rogers Carroll,
2015 Land Title Building,
Philadelphia 10, Penna.,

Edwin P. Rome,
1529 Walnut Street,
Philadelphia 2, Penna.,
Attorneys for Petitioner.

APPENDIX A.

OPINIONS BELOW.

BOARD OF PUBLIC EDUCATION SCHOOL DISTRICT OF PHILADELPHIA, APPELLANT, v. BEILAN.

Argued November 30, 1955; reargued January 12, 1956. Before STERN, C. J., STEARNE,* JONES, BELL, CHIDSEY, MUSMANNO and ARNOLD, JJ.

Appeal, No. 97, Jan. T., 1956, from order of Court of Common Pleas No. 6 of Philadelphia County, Dec. T., 1954, No. 4742, in case of Board of Public Education, School District of Philadelphia v. Herman A. Beilan. Order reversed; reargument refused October 3, 1956.

Appeal by teacher from decision of Superintendent of Public Instruction dismissing him.

Appeal sustained and decision of Superintendent reversed, before BOK, P. J., FLOOD and LEVINTHAL, JJ. Board of Public Education appealed.

C. Brewster Rhoads, with him *Sidney L. Wickenhaver* and *Edward B. Soken*, for appellant.

Thomas D. McBride, with him *John Rogers Carroll*, for appellee.

Thomas A. Masterson and *Julian E. Goldberg*, filed a brief for the American Civil Liberties Union, Greater Philadelphia Branch, under Rule 46.

* Died before decision.

OPINION BY MR. JUSTICE CHIDSEY, June 25, 1956:

Herman A. Beilan, a professional employe of the School District of Philadelphia, taught English for the Simon Gratz High School. He had been a teacher in the District for about 23 years. At the written request of Dr. Louis P. Hoyer, Superintendent of the Philadelphia Public Schools, Beilan reported to the Superintendent's office for an interview on June 25, 1952. Dr. Hoyer advised Beilan that he had information bearing on the question of the latter's loyalty and wanted to know whether the information was correct. Mr. Beilan suggested that the Superintendent ask the questions, whereupon Dr. Hoyer asked whether Mr. Beilan was Press Director of the Professional Section of the Communist Political Association in 1944. Beilan did not answer the question but stated he wanted to consult counsel. Dr. Hoyer acceded to this request and stated that he wanted Beilan to report again after he had consulted counsel. There the matter rested until Dr. Hoyer made a written request in October that Mr. Beilan report to the Superintendent's office on October 14th to further discuss matters already brought to Beilan's attention. Beilan came to the Superintendent's office and stated that he had consulted counsel and had been advised that he could not legally answer the question asked about his Communist activity in 1944 or similar questions. Dr. Hoyer advised Mr. Beilan that this was a very serious and important matter and that failure to answer might lead to his dismissal. Beilan, however, persisted in his refusal.

On November 18, 1953 Beilan testified before a subcommittee of the House Committee on Un-American Activities of the House of Representatives of the United States Congress. He testified to his educational and employment background. When asked by the Committee whether he had ever been a member of the Communist Party, Mr. Beilan pleaded the privilege of the Fifth Amendment of the Federal Constitution. Counsel for the Congressional Committee stated that the Committee had re-

ceived sworn testimony that Mr. Beilan was a member of the Communist Party; that in 1943 and 1944 he was a member of the Daily Worker Press Club; that he was Press Director of the Professional Section of Section 8 of the Communist Political Association in 1944; that he was Secretary of Section 8 of the Communist Political Association in 1945; that he was a member of the Communist Party and held membership book number 78343 in 1944; that he held membership book number 87591 in the Communist Party in 1945; that he was organizer of the Professional Section of the Communist Party of Eastern Pennsylvania and Delaware in 1946 and 1947; that he was a member of the International Workers Order (an organization cited by the U. S. Attorney General as subversive) in 1947 and 1949. He was asked separately about each of these activities. In each case he refused to answer and relied on the protection of the Fifth Amendment.

On December 22, 1953 the Board of Education conducted a formal hearing which was private at Mr. Beilan's request.[1] Beilan, who was represented by counsel, did not testify in his own behalf. The hearing was conducted pursuant to a resolution passed by the Board wherein Beilan was charged under Section 1122 of the Public School Code of 1949, Act of March 10, 1949, P. L. 30, 24 PS § 11-1122, with incompetency and persistent and wilful violation of the school laws. The charge of incompetency was based on two counts, one, Mr. Beilan's conduct in refusing to respond to the Superintendent's inquiry as to his loyalty and the other his conduct in refusing to respond to the Congressional Committee's inquiry as to his alleged Communist affilia-

1. The court below refers to the interval which elapsed between the interviews by the Superintendent and the institution of charges and hearing thereon. A substantial number of other teachers refused to respond to similar inquiries made by Dr. Hoyer, the Superintendent of Schools. No charges were preferred against any of them by the School Board until all had been interviewed. Counsel for appellant states in his brief that, as in Beilan's case, the interviews were conducted privately so that the teachers would not be embarrassed by publicity and that this took a great deal of time.

tions, to which he invoked the Fifth Amendment. On January 7, 1954 by a vote of 14 to 1, the Board held that the charges had been sustained and ordered Mr. Beilan's discharge. Beilan appealed to the Superintendent of Public Instruction of the Commonwealth, who upheld the action of the Board. Beilan then appealed to the Court of Common Pleas of Philadelphia. His appeal was heard on the record and no further testimony was taken. The court reversed the order of the Superintendent of Public Instruction and set aside Mr. Beilan's dismissal. This appeal followed. Extended briefs were filed on behalf of appellant and appellee, and the American Civil Liberties Union filed a brief under Rule 46 urging affirmance.

From the opinion of the court below it appears that its decision was based first on the ground that the charges did not come within the purview of the School Code, and second that ". . . the proceedings before the Board of Education were actually concerned solely with the question of appellant's [Beilan's] suspected disloyalty. . . .". We disagree with both of these conclusions.

Considering them in reverse order, we find absolutely no support for the second conclusion reached by the court below.[2] It not only impugns the good faith of the members of the Board but completely brushes aside the record which consistently from beginning to end irrefutably demonstrates that appellee was not dismissed for subversion or disloyalty but for refusal to answer pertinent questions bearing directly upon his fitness as a teacher and, therefore, his competency. This is clear from the charges the testimony adduced and the rulings of the Chairman of the Board who presided at the hearing. The issue before the Board was expressly defined and limited at the outset of the hearing by counsel for the Board and counsel for the

2. In its opinion the court states: "The school authorities obviously desired to dismiss appellant because they suspected him of disloyalty." and "The Tenure Act was utilized as an expedient shortcut.".

appellee who were in complete agreement in this regard.[3] The court's conclusion is the more difficult to understand in view of the statement in its opinion that "Appellant was not dismissed on the ground that he advocates or participates in subversive doctrines. His contract of employment was terminated on the alleged grounds of incompetency as a teacher and of wilful and persistent violation of the school laws", and later in its opinion that ". . . the testimony presented at the hearing related merely to appellant's refusal to answer questions, and no attempt was made to prove that appellant was actually a Communist or otherwise disloyal.".

We turn to the conclusion of the court below that the charges against appellee did not come within the grounds for dismissal set forth in the School Code of 1949, supra. Under the Act of May 18, 1911, as amended by the Act of June 20, 1939, P. L. 482, the grounds for dismissal of a teacher were "immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, and persistent and wilful violation of the school laws of this Commonwealth". The School Code of 1949 added as an additional ground for dismissal "advocation of or participating in un-American or subversive doctrines". In 1951 there was enacted the Loyalty Act, sometimes called the Pechan

3. Counsel for the School Board stated: "I am not asking this Board in this proceeding or any other proceeding that I know of to pass upon the loyalty or disloyalty of this particular teacher. I am say that the things which this teacher did in connection with his professional obligations were such as to result in incompetency sufficient to discharge the teacher under the School Code.", and counsel for Mr. Beilan stated: "Mr. President, if you please, I have no intention of seeing this proceeding become a loyalty hearing. Mr. Rhoads [counsel for the School Board] has stated that it is not. I agree with him completely . . .". Later in the hearing, counsel for Mr. Beilan also stated: "We have no intention of making a loyalty proceeding of this hearing. We agree with Mr. Rhoads and Mr. Weinrott [a member of the Board] who stated that the only issue is whether this particular man refused to answer certain particular questions and whether, as a matter of law, that amounts to a ground for dismissal. . . .".

Act, which provides for the removal of subversives in all areas of public service. Section 16 of this Act repealed Section 1122 of the School Code of 1949 in so far as it authorized dismissal of a teacher for "advocation of or participating in un-American or subversive doctrines". All other grounds for dismissal, including incompetency, remained in force as theretofore. If the appellee had been charged with being a subversive it may be conceded that the Loyalty Act should have been employed, but this was not the charge. *Appellee was charged with incompetency based on his refusal to respond to a pertinent inquiry as to his fitness to be a teacher.* The Loyalty Act preempted the field of dismissal for subversion as therein defined, but other causes of dismissal remained unaffected. Section 15 of the Loyalty Act expressly provides: "The provisions of this act shall not affect the right to discharge any person for any cause other than those provided for by this act or without cause under existing law. . . .". Moreover the Loyalty Act provides neither the procedure nor the substantive law with respect to the duty of a teacher to answer proper questions. The provisions of the School Code do provide the basis for dismissal of a teacher who refuses to answer such questions.

We have held that incompetency as a cause for dismissal is to be given a broad meaning. In *Horosko v. Mount Pleasant Township School District et al.*, 335 Pa. 369, 6 A. 2d 866, Mr. Justice LINN, speaking for the Court, at pps. 374-375 said: "The term 'incompetency' has a 'common and approved usage'. The context does not limit the meaning of the word to lack of substantive knowledge of the subjects to be taught. Common and approved usage give a much wider meaning. For example, in 31 C. J., with reference to a number of supporting decisions, it is defined: 'A relative term without technical meaning. It may be employed as meaning disqualification; inability; incapacity; lack of ability, legal qualifications, or fitness to discharge the required duty.' In Black's Law Dictionary (3rd edi-

tion) page 945, and in Bouvier's Law Dictionary (3rd revision), p. 1528, it is defined as 'Lack of ability or fitness to discharge the required duty.' Cases construing the word to the same effect are found in Words and Phrases, 1st series, page 3510, and 2nd series, page 1013. Webster's New International Dictionary defines it as 'want of physical, intellectual, or moral ability; insufficiency; inadequacy; specif., want of legal qualifications or fitness.' Funk & Wagnalls Standard Dictionary defines it as 'General lack of capacity of fitness, or lack of the special qualities required for a particular purpose.' ".

Certainly a teacher who refuses to respond to a pertinent inquiry relative to his fitness to teach is not competent within the broad reach of that term, whether the inquiry concerns loyalty or any other proper subject of inquiry. Frankness and cooperation with an administrative superior bear directly upon a teacher's competency. They are as essential in one occupying a post of public trust and civic responsibility as academic qualifications. Can it be seriously argued that where the superintendent of schools has trustworthy information indicating that a teacher has an incurable communicable disease or that he is a peddler of narcotics or, as here, that he may entertain Communistic ideologies which could be transmitted to the youth in his care, that no inquiry can be made as to the fact and that the teacher is not required to respond? As well stated in the brief of counsel for the appellant; ". . . The State Constitution requires the General Assembly to maintain a thorough and efficient system of public schools. The School Code is the legislative implementation of this Constitutional duty. The rights and duties of a Superintendent have grown with custom and with professional usage. Many of his duties are imposed on him by tradition. It is one of his duties under the School Code to make sure that the teaching staff is competent, and therefore to weed out professionally unfit teachers. This is a continuing process that the Superintendent carries on. The

Superintendent has the power and the duty, whenever the facts indicate the need, to inquire into and reevaluate the fitness of a teacher.". Unquestionably there is a reciprocal duty on the part of the teacher to fully and frankly cooperate. He may not block such proper inquiry by secretiveness or concealment.

In *Adler et al. v. Board of Education of the City of New York,* 342 U. S. 485, the majority opinion of the U. S. Supreme Court by Mr. Justice MINTON, upholding the constitutionality of the Feinberg Law which prohibits employment of members of subversive organizations in the public schools of the State of New York, stated at p. 493: ". . . A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. . . .".

In the instant case the court characterized appellee's conduct as "misguided secretiveness and lack of candor", which it said it did not condone. The secretiveness consisted of a deliberate and insubordinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness. Such conduct stamped him with incompetence as a professional employe in the public schools.

The court below states that the Superintendent's query related to a political association alleged to have occurred eight years prior to the interview and that appellee's refusal to answer "that question" was obviously not relevant to the issue of his present competency. The court overlooks the fact that appellee not only refused to answer the question put to him, but any similar questions. From the testimony it is obvious that the question asked by the Superintendent was the forerunner of other similar ques-

tions, the asking of which was effectually thwarted by appellee's refusal to answer any questions of similar import. Moreover, the one question asked, that is, whether appellee had been Press Director of the Professional Section of the Communist Political Association, was a most significant one and although dating back to 1944, was pertinent and of importance for determination whether the affiliation still existed, or if not, the circumstances under which it had terminated. Inquiry into appellee's past activities was relevant to his present fitness. It is unnecessary to rely only upon the statement of Dr. Francis B. Haas, Superintendent of Public Instruction and an eminent educator, that in sustaining a teacher's dismissal, past activities are relevant to present fitness, for such has been unequivocally declared by the U. S. Supreme Court. In *Adler et al. v. Board of Education of the City of New York* (1952), supra, the Court stated: ". . . One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate.".

In *Garner et al. v. Board of Public Works of Los Angeles et al.*, 341 U. S. 716 (1951), the U. S. Supreme Court upheld a statutory requirement of the City of Los Angeles that city employes disclose, under affidavit, any past or present Communist membership. Certain employes had taken the loyalty oath required by the same law, but refused to furnish the information required in the affidavit. In the opinion of the Court it is stated, p. 720: "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suita-

bility for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into determining fitness for both high and low positions in private industry and are not less relevant in public employment. . . .".

In the recent case of *Slochower v. Board of Higher Education of New York City*, 350 U. S. 551 (1956), Slochower had been dismissed by the Board as an associate professor at Brooklyn College under a section of the City Charter which provided: ". . . that whenever an employee of the City utilizes the privilege against self-incrimination to avoid answering a question relating to his official conduct, 'his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.' . . .". In setting aside the dismissal, Mr. Justice CLARK, who delivered the opinion of the Court, pointed out that dismissal under the section was automatic, with no right to charges, notice, hearing or opportunity to explain, and thus lacking in due process. In its opinion the Court referred to the *Garner* case. In distinguishing it from the case at hand the Court stated at p. 556: ". . . Garner v. Los Angeles Board, 341 U. S. 716, 720, upheld the right of the city to inquire of its employees as to 'matters that may prove relevant to their fitness and suitability for the public service,' including their membership, past and present, in the Communist Party or the Communist Political Association. There it was held that the city had power to discharge employees who refused to file an affidavit disclosing such information to the school authorities.". And again at p. 558: "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at "the property, affairs, or government of the

city, or . . . official conduct of city employees.' In this respect the present case differs materially from Garner, where the city was attempting to elicit information necessary to determine the qualifications of its employees. . . . ."

Following the erroneous concept of the issue by the court below, much of the argument of counsel for appellee proceeds upon the unwarranted assumption that appellee was charged with subversion. In the *Slochower* case the Supreme Court reaffirmed its ruling in an earlier case that the privilege of self-incrimination is not the equivalent of a confession of guilt or conclusive presumption of perjury. If appellee had been charged with subversion, his reliance upon the Fifth Amendment at the Congressional hearing would not have established his disloyalty. But the charge here was not disloyalty but incompetency, based on his refusal to respond to inquiry pertaining to his fitness.

There were three charges against the appellee and if any of them was sustained, his dismissal was justified. We are satisfied that his refusal to answer the inquiry of his administrative superior constituted incompetency within our definition of that term. We therefore deem it unnecessary to pass upon the other charges preferred, based upon his refusal to answer questions before the Congressional Committee and on persistent and wilful violation of the school laws. Appellee cites *Wieman et al. v. Updegraff et al.*, 344 U. S. 183, where the Supreme Court held that dismissal of governmental employes for failure to take the loyalty oath prescribed by an Oklahoma statute was lacking in due process. Mr. Justice CLARK, in discussing the *Wieman* case in his opinion in the *Slochower* case, pointed out that the Oklahoma loyalty oath based non-employability solely on the fact of membership in certain organizations, that such membership might be innocent and that "the classification of innocent and guilty together was arbitrary". In the *Wieman* case Mr. Justice CLARK reconciled the decision in the *Garner* case where the loyalty oath

involved did not expressly require knowledge of the aims and purposes of the Communist Party or Communist Political Association by stating that scienter was implicit in each clause of the oath and that it was assumed in *Garner* that Los Angeles would give the petitioners who had refused to sign the oath an opportunity to take it as interpreted and resume their employment. In *Wieman* failure to take the prescribed oath automatically disqualified persons from public employment. They were afforded no opportunity to explain that during their affiliation with a proscribed organization they were innocent of its purpose. In the instant case full opportunity was afforded to appellee to deny his affiliation with any Communist body, or if such existed, that he did not know of the organization's aims and objectives or that he had completely disassociated himself from any such affiliation. Unquestionably an affirmative answer to the Superintendent's question about a past subversive affiliation would have been followed by inquiry whether such affiliation or other affiliations still existed, or if they had been discontinued, when and under what circumstances. This would have been a normal course of inquiry. We know of no case where a teacher has been dismissed who has entirely discarded past subversive affiliations and has abided by a loyalty oath taken in good faith. Both the *Garner* and the *Wieman* cases uphold the right of the public employer to inquire into the employe's fitness. The provisions with respect to the loyalty oaths there involved embodied a complete inquiry. In the instant case appellee manifested his recalcitrance at the initial question asked. He refused to answer *any* questions of the Superintendent bearing on the subject matter. Thus he completely thwarted *any* inquiry. The inquiry was blocked at the threshold and was rendered completely abortive.

Appellee also contends that the Superintendent was not authorized to make the inquiry. There is no more important branch of government than the administration of our public school system. It is a continuing process of ed-

ucation for the maintenance of our democracy. The right of a superintendent of schools to revaluate a teacher's fitness to be retained in his position is inherent and need not be expressly authorized by statute or local rule or regulation. In a private school the refusal to respond to a pertinent inquiry as to a teacher's fitness made by the superintendent or head of the institution certainly would not be tolerated, but would result in the teacher's discharge. A public school should not be placed in an inferior position in this regard. While the tenure provisions of the School Code protect iteachers in their positions from political or other arbitrary interferences, they were not intended to insulate them from proper inquiry as to their fitness and their discharge for failure to cooperate with their superiors in authority to the detriment of the efficient administration of the public school system. The School Code expressly provides that incompetence shall be a cause for dismissal and under the broad meaning properly ascribed to that term, appellee rendered himself incompetent as a member of the school organization.

Counsel for appellee refers to our decision in *Commonwealth ex rel. Roth v. Musmanno*, 364 Pa. 359, 72 A. 2d 263; *Schlesinger Petition*, 367 Pa. 476, 81 A. 2d 316; *Matson v. Jackson*, 368 Pa. 283, 83 A. 2d 134. In the *Roth* case we held that the privilege of serving as a juror may not be extinguished, abated or diminished by any proceeding lacking in due process. In the *Schlesinger* case we similarly held that the privilege of an attorney to practice his profession could not be extinguished, abated or diminished without a proceeding conforming to due process. In the *Matson* case we held that the Administrative Code does not confer any authority upon the Attorney General to conduct a public hearing into the alleged Communistic leanings of a district attorney. In the instant case the School Code authorized the dismissal of a teacher for incompetency and prescribed at length the procedure with respect thereto. Under its provisions appellee was notified in writing of the

charges against him. He received a hearing before the Board of Education and exercised the right given him to appeal to the State Superintendent of Public Instruction and thereafter to the court. It cannot be claimed, therefore, that his dismissal was without due process of law.

In refusing to answer the Superintendent's inquiry appellee asserted no constitutional right or privilege. The Superintendent had the power, if not indeed the duty, to make the inquiry, and appellee had the duty to cooperate by answering freely and frankly. His defiant conduct in refusing to respond justified his dismissal on the ground of incompetency.

The order of the court of common pleas is reversed and the order of the State Superintendent of Public Instruction affirming appellee's dismissal by the Board of Public Education is sustained at the cost of appellee.

CONCURRING OPINION WITH RESERVATION BY MR. JUSTICE MUSMANNO:

I concur in the decision in this case and with all that is said in the Opinion of the Court with the exception of the citation of the two cases of *Commonwealth ex rel. Roth v. Musmanno*, 364 Pa. 359, and *Schlesinger Petition*, 367 Pa. 476. I file this short Opinion only because I would not want my approval of the decision to be interpreted as an acquiescence in the citation of those two cases as authority for the conclusions contained therein. In my view of the matter, those two cases were badly decided and, therefore, do not represent the law. I believe that counsel for the defendant here were fully justified in advancing the *Roth* and *Schlesinger* decisions in support of their erroneous position that Beilan was not accorded due process of law, because if Alice Roth, in her case, was not accorded due process of law, then Beilan was denied it also. If Schlesinger was entitled to a writ of prohibition against the presiding judge in his case, Beilan should have asked

for an injunction against the Philadelphia Board of Public Education in this case.

Of course, it is not my intention here to say any more about the *Roth* and *Schlesinger* cases than I have just said. It is enough to refer to *In Re Grand Jury*, 98 P.L.J., 152; *In re: Schlesinger Contempt*, 99 P.L.J., 247; and *In re: Schlesinger Contempt*, 99 P.L.J., 275.

The Opinion written by Mr. Justice CHIDSEY in this case is an excellent one, and it is regrettable that it had to be marred by the reference, with approval, to the *Roth* and *Schlesinger* cases, supra.

DISSENTING OPINION BY MR. JUSTICE JONES:

The issue in this case is *not* whether a Pennsylvania school board may dismiss a teacher for membership in the Communist Party or in any other subversive organization committed to the overthrow of the Government of the United States by force and violence. Of course, it may do so—a statute expressly so authorizes: Pennsylvania Loyalty Act of December 22, 1951, P. L. 1726, 65 PS § 211 et seq., commonly referred to as the Pechan Act. See, also, *Albert Appeal*, 372 Pa. 13, 92 A. 2d 663, which was based on a subsequently repealed provision of Section 1122 of the Tenure Act in the Public School Code, as amended by the Act of March 10, 1949, P. L. 30.

The primary question here involved is,—By what legal procedure may a school board competently find the disqualifying factor which warrants the teacher's dismissal? It will hardly be disputed that the answer to that question is that it must be in a proceeding which comports with the requirements of due process. And, the established tenure of a school teacher is a right of which he cannot be deprived, in circumstances reflecting on his loyalty, without due process of law: *Wieman v. Updegraff*, 344 U. S. 183.

The crucial question, then, in this case is whether the respondent, Beilan, was dismissed from his position

as a teacher in the public schools of Philadelphia in compliance with the requirements of due process. The importance of that inquiry is not to be gainsaid. Strict adherence to required legal procedures, especially where one's loyalty is being impugned, affords the greatest and, in last analysis, the ultimate assurance of the inviolability of our freedoms as we have heretofore known them in this Country. Least of all, should they be impaired or trenched upon by procedural shortcuts.

The Loyalty Act of 1951, supra, provides in Section 3 that "No subversive person, as defined in this act, . . . shall be eligible for employment in or appointment to any office or any position of trust or profit in the government of or in the administration of the business of this Commonwealth, or of any school district, county, municipality or other political subdivision of this Commonwealth." Section 6 provides that the "appointing authority may . . . upon written complaint, investigate any person, including teachers and other employes of the public school system, . . . to determine whether he is a subversive person." Section 7 provides that "Any person, including teachers and other employes of the public school system, who has been so notified under this act, shall have a right to a hearing before the proper appointing authority within thirty (30) days after receiving said notification." Section 10 provides for appeal by a teacher to the Superintendent of Public Instruction from a determination made by the Board of Education that he is a subversive. And, Section 12 provides for an appeal to the court of common pleas by a teacher aggrieved by the action of the Superintendent of Public Instruction. Indeed, on the request of the appellant teacher, the hearing in the court of common pleas must be *de novo*. And, of course, there there is a right to appellate review of the action of the court of common pleas on broad certiorari in the statutory circumstances obtaining.

With the offense thus proscribed and the procedure for ascertaining its existence in the person of any one, covered by the Act, thus carefully spelled out, why should any one think that a teacher suspected of disloyalty could be dismissed under any other procedure than that prescribed by the Loyalty Act. Does not Section 13 of the Act of March 21, 1806, P. L. 558, 4 Sm. L. 326, § 13, 46 PS § 156, provide that "In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assemby of this commonweath, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect"? The foregoing provision has been cited and respected by this court many times down to the present: see, e.g., *Jacobs v. Fetzer*, 381 Pa. 262, 265, 112 A. 2d 356 (1955); *Collegeville Borough v. Philadelphia Suburban Water Company*, 377 Pa. 636, 645, 105 A. 2d 722 (1954); *Oteri Appeal*, 372 Pa. 557, 561, 94 A. 2d 772 (1953). As was declared in *Derry Township School District v. Barnett*, 332 Pa. 174, 177, 2 A. 2d 758, with respect to the Act of 1806, supra, "When a statutory remedy has been provided, each step in the proceeding can be taken only as the legislature has prescribed: [citing cases]."

How, then, did the School Board come to disregard the procedure prescribed by the Loyalty Act for investigating and acting upon the case of a teacher suspected of disloyalty? By the simple expedient of professing that the Board's inquisition had nothing whatever to do with Beilan's "loyalty or disloyalty". The Board avows that it dismissed him for "incompetency" under the Public School Code for his refusal to answer a question by the Superintendent of Schools on two occasions (June and October, 1952) as to whether he had been press director of the professional section of the Communist Political Association eight years before and for his refusal to answer questions of similar nature by counsel for a subcommittee of the Un-

American Activities Committee of the House of Representatives on November 18, 1953. The Committee's interrogations were concerned with Beilan's political and organizational affiliations four to ten years before. In refusing to answer the Un-American Activities Committee's questions, he pleaded the protection of the Fifth Amendment although, in answer to a question as to whether he had ever been a member of the Communist Party, he testified "I am not now a member." He also told the Committee,—"I am willing to talk about myself and about no one else."

On November 24, 1953, the Superintendent of Schools informed Beilan by letter that he was rated "unsatisfactory" as a result of his refusal to answer questions presented by the Superintendent and by the subcommittee of the Un-American Activities Committee of the House of Representatives. The next day, the Board of Public Education preferred charges against Beilan on the grounds of "incompetency and persistent and wilful violation of the school laws of this Commonwealth". The fact is that Beilan had been a teacher in the public schools of Philadelphia for twenty-three years, his employment in later years being as a teacher in one of the City's high schools. He had tenure under the Pennsylvania Teachers Tenure Act, and for every one of his twenty-three years of teaching he had received a "satisfactory" rating from the proper officer of schools even down to the time of his appearance before the Un-American Activities Committee. Yet, he was dismissed for "incompetency".

The charge of "persistent and wilful violation of the school laws of this Commonwealth" dropped completely out of the case at the hearing before the Board of Education. It had obviously been inserted as a sort of catch-all to cover any dereliction of the teacher that might possibly crop out at the hearing. As counsel for the Board explained it, the "persistent violation" charge depended upon whether "the sum total of the conduct which will be demonstrated constitutes a generalized violation of the School

Code under the wilful and persistent violation terms". Apparently not having a single overt act to support the charge (other than Beilan's refusal to answer the Superintendent's one question and those asked by the Un-American Activities Committee), counsel for the Board was forced to abandon the charge. In answer to the question of the President of the Board whether he could point to any section of the law that had been violated, counsel for the Board answered,—"Under the wilful and persistent violation of the School Code provision, yes, sir, *there is none*" (Emphasis supplied).

That leaves as the basis for the charge of incompetency Beilan's refusal to answer the School Superintendent's one question as to his political affiliation of eight years before (it was not until the Act of December 21, 1951, P. L. 1712, that the Communist Party was denied a place on an election ballot in Pennsylvania where it had appeared at prior times) and his refusal to answer questions of a similar nature by the Un-American Activities Committee on a plea of the protection afforded by the Fifth Amendment. But, the record of Beilan's interrogation by the Un-American Activities Committee, which was received in evidence against him at his hearing before the Board of Education, was entirely incompetent to justify his dismissal as a school teacher. The recent decision of the Supreme Court of the United States in *Slochower v. The Board of Higher Education of The City of New York,* U. S. (handed down April 9, 1956), holds that a State school teacher having tenure may not be summarily dismissed for pleading the Fifth Amendment in refusing to answer questions of a congressional committee as to his prior political affiliations. There is left, then, as the basis of the finding of Beilan's incompetency only his refusal to answer the School Superintendent's single question whether he had been press director of the professional section of the Communist Political Association eight years before.

But before we come to that! Even assuming, arguendo and quite momentarily, that Beilan's refusal to answer the Superintendent's question justified a finding that he was incompetent within the meaning of that term as used in Section 1122 of the School Code, as amended, his dismissal should at least be reversed and a new hearing awarded because of the patent error permeating the Board's determination. There were, as we have seen, two counts in the charges against Beilan before the Board, one of which (viz., his refusal to answer the questions of the Un-American Activities Committee on a plea of the Fifth Amendment) was incompetent, but the Board rendered what was tantamount to a general verdict. It is indeed possible that the Board's determination was based in whole or, at least, in part on the invalid count and, hence, constituted a lack of due process. The situation was well typified in *Kotteakos v. United States*, 328 U. S. 750, 765, where it was said,—"But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." See, also, *Hisak v. Lehigh Valley Transit Co.*, 360 Pa. 1, 6, 59 A. 2d 900, and cases there cited.

Beilan's refusal to answer the Superintendent's question did not render him incompetent, and no indulgence in semantics can change that fact. The case of *Horosko v. Mt. Pleasant Township School District*, 335 Pa. 369, 6 A. 2d 866, which the majority opinion uses to define the term "incompetency", does nothing of the kind. It consists of a statement of generalities in the negative, covers everything and touches nothing. The fact is that the Superintendent was apparently not disturbed by Beilan's failure to answer his question. He did nothing about it from June, 1952, until November, 1953, a few days after the Un-American

Activities Committee visited Philadelphia. Yet, as already stated, during all of that period of time Beilan had been given a "satisfactory" rating right down to the time of his appearance before the Un-American Activities Committee.

Nor can the term "incompetency", as used in Section 1122 of the School Code, be held to embrace acts of subversion or disloyalty. The legislative history of Section 1122 of the School Code and of the Loyalty Act makes that fact clear as day. Prior to 1949, Section 1122 contained "incompetency" as one of the grounds for a school board's dismissal of a teacher. By Act of March 10, 1949, P. L. 30, the legislature amended Section 1122 by adding thereto as a further ground for the dismissal of a teacher his "advocation of or participating in un-American or subversive doctrines". (Incidentally, it was under that particular amendment that *Albert Appeal*, supra, was decided.) However, in enacting the Loyalty Act of December 22, 1951, which made subversive public employees, including school teachers, subject to dismissal by the appointing authority upon investigation, notice and hearing, the above mentioned 1949 amendment of Section 1122 of the School Code was specifically repealed in the following significant language, —"Section 1122 of the act [of March 10, 1949, P. L. 30] . . . and its amendment, is hereby repealed insofar as it authorizes termination of the contract of a professional employe [i.e., a school teacher] for advocating or participating in un-American or subversive doctrines.",

The learned court below had not the slightest difficulty in seeing through the gossamer with which the Board obscures the real basis for its dismissal of Beilan. It presumes to say that its action was wholly unrelated to any question of Beilan's loyalty. The court concluded, however, that "the proceedings before the Board of Education were actually concerned solely with the question of [Beilan's] suspected disloyalty." With that conclusion, I thoroughly agree. But, the majority state in the opinion for this court that the lower court's conclusion in the particular just

quoted "impugns the good faith of the members of the Board." Most respectfully, I answer that it does nothing of the kind. There was neither cause nor occasion below, any more than there is here, to impugn the good faith of the members of the Board—a group of highly respected, public spirited citizens gratuitously performing a most important civic service. Yet, it was the duty of the court below, just as it is our duty now, in passing upon this controversy, to view the record objectively and draw our own conclusions therefrom instead of complaisantly accepting the Board's own subjective estimate of its proceeding against Beilan.

The hearing which the Board conducted into Beilan's refusal to answer the Superintendent's one question and the questions of the Un-American Activities Committee was a loyalty proceeding from beginning to end; and it is rather disingenuous for anyone to suggest otherwise. If it was not a loyalty proceeding, it was nothing other than a *brutum fulmen* except for the seriousness of its determination which this court now enthrones as finality. The Superintendent of Schools testified that when Beilan came to his office, pursuant to summons, the Superintendent told him that he had information that bore on the question of Beilan's loyalty and that he wanted to know about it. And, the State Superintendent of Public Instruction, in his opinion dismissing Beilan's appeal from the Board's action, made a formal finding that the local Superintendent had informed Beilan that he "wished to ask him some questions having an important bearing on his loyalty."

One would have to be naive indeed to be able to say truthfully that he did not believe that Beilan's refusal to answer the array of stigmatizing questions asked him by counsel for the Un-American Activities Committee (on counsel's say-so that the Committee had "sworn testimony" to support the implications of the questions) had not produced in the minds of the Board members an implied confession by Beilan of his guilt. Such was the practical effect

of the procedure and made of the Board's hearing an inquiry into Beilan's loyalty—a proceeding possible in Pennsylvania only under the Loyalty Act. In *Slochower v. Board of Education*, supra, Mr. Justice CLARK recognized for the Supreme Court that "In practical effect the questions asked are taken as confessed and made the basis of the discharge." Even here, although the record of the hearing before the Un-American Activities Committee has no proper place in this case and should be disregarded, the majority opinion buttresses its presentation with a detailed repetition of the questions asked by the Committee's counsel and adds that "In each case he refused to answer and relied on the protection of the Fifth Amendment."

The tendency of recent years to treat a plea under the Fifth Amendment against self-accusation as a confession of guilt was condemned by the Supreme Court in *Slochower v. Board of Education*, supra, in the following trenchant language: "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers than they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen.' *Brown v. Walker*, 161 U. S. 591, 610. We have reaffirmed our faith in this principle recently in *Quinn v. United States*, 349 U. S. 155. In *Ullmann v. United States*, decided last month, we scored the assumption that those who claim this privilege are either criminals or prejurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann*, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who

otherwise might be ensnared by ambiguous circumstances See Griswold, The Fifth Amendment Today (1955)."

The right has been recognized in England as an age less part of the Country's unwritten constitution. A century before the adoption of our Federal Constitution and the establishment of our National Government, the plea was made in the Colony of Pennsylvania on a memorable occasion reported by Dean Griswold in his pamphlet entitled "The Faith Amendment Today", Harvard University Press, 1955. As there related, in 1689, William Bradford, a young printer who had introduced the art of printing to the middle provinces of America, had printed the Charter of the Provinces so that the people could see their rights. Apparently anticipating some trouble he had not put his name on the pamphlet. He was summoned by the Governor of the Colony who interrogated him as to who had given him license thus to print. He responded "Governour, it is an impracticable thing for any man to accuse himself; thou knows it very well. . . . Let me know my accusers, and I shall know the better how to make my defence." The episode is so highly pregnant with meaning for us today that the colloquy merits printing here in full.[1]

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1. *"Governour.*—Why, sir, I would know by what power of authority you thus print? Here is the Charter printed!

"Bradford.—It was by Governour Penn's encouragement I came to this Province, and by his license I print.

"Governour.—What, sir, had you license to print the Charter? I desire to know from you, whether you did print the Charter or not, and who set you to work?.

"Bradford.—Governour, it is an impracticable thing for any man to accuse himself; thou knows it very well.

"Governour.—Well, I shall not much press you to it, but if you were so ingenuous as to confess, it should go the better with you.

"Bradford.—Governour, I desire to know my accusers; I think it very hard to be put upon accusing myself.

"Governour.—Can you deny that you printed it? I do know you did print it, and by whose directions, and will prove it, and make you smart for it, too, since you are so stubborn.

"John Hill.—I am informed that one hundred and sixty were printed yesterday, and that Jos. Growden saith he gave 20*s* for his part towards the printing it.

We have, indeed, come a long way since 1689. But, one may well wonder at times in just what direction so far as respect for the constitutional rights of the individual is concerned. Here is a case of a long-time public school teacher, entitled by statute to tenure, who is deprived of his professional status and livelihood because he pleaded the Fifth Amendment in refusing to answer questions of a congressional committee, touching his loyalty. He has never yet been confronted byhis accusers or given an opportunity to cross-examine them. If it be said, by way of a paraphrase of Mr. Justice HOLMES' oft-repeated epigram, that no one has a constitutional right to be a school teacher, still one does not surrender his constitutional rights by becoming a public school teacher.

I would affirm the order of the court below.

DISSENTING OPINION BY MR. JUSTICE BELL:

It is with great regret that I feel compelled to dissent from the majority opinion which has reached such a desirable conclusion.

Beilan, a teacher of English at the Simon Gratz High School, Philadelphia, was dismissed on the ground of "incompetency" and "of persistent and willful violation of the school laws" ~~and "of persistent and willful violation of the school laws~~" which are grounds for dismissal *under The Teachers' Tenure Act* of May 18, 1911, P. L. 309, as amended by Act of June 20, 1939, P. L. 482. The Superintendent of Public Instruction of the Commonwealth of Pennsylvania affirmed the dismissal; the lower Court, in a very able opinion, reversed the dismissal, and set aside the discharge of Beilan.

"*Bradford.*—It's nothing to me, what 'Jos. Growden saith.' Let me know my accusers, and I shall know the better how to make my defence."* "*See John William Wallace, *An Address Delivered at the Celebration by the New York Historical Society, May 20, 1863, of the Two Hundredth Birthday of Mr. William Bradford.* Albany, 1863, pp. 49-52."

This Court is asked to reverse the Court below and to justify Beilan's dismissal *solely* on the ground of "incompetency". Appellant admits that if the word "incompetency" as used in said Act is restricted to a narrow interpretation, i.e., educational background and technical ability to teach the subject, Beilan was not incompetent. However, appellant correctly contends that the word "incompetency" as used in the Tenure Act has a much broader meaning (see, inter alia, *Horosko v. Mt. Pleasant Township School District*, 335 Pa. 369, 6 A. 2d 866); and further contends—and this is the real issue—that it includes (1) any present but unproved association with the Communist Party, and (2) failure to answer questions—under the privilege of the Fifth Amendment—concerning past associations with the Communist Party. Appellant admits in its brief that Beilan was discharged solely because he refused to answer questions concerning his past subversive affiliations. We cannot shut our eyes to the inescapable fact which we are convinced—notwithstanding the earnest, able argument of counsel for the Board—is glaringly disclosed by this Record, that Beilan was fired because the Board believed that he was a Communist.

The teaching profession apparently believes, under the theory or doctrine of Academic Freedom, that a teacher has a constitutional right to think as he pleases, believe as he pleases, speak and teach and *do* as he pleases. Everyone in the United States has the right to think and believe whatever he wishes. However, Freedom of Speech, which is guaranteed by the Constitution of the United States and the Constitution of Pennsylvania, is neither absolute nor unlimited: *Dennis v. United States*, 341 U. S. 494 (1950); *Gitlow v. People of State of N. Y.*, 268 U. S. 652; *Wortex Mills, Inc. v. Textile Workers Union*, 369 Pa. 359, 85 A. 2d 851. Moreover a citizen has no absolute and unqualified constitutional right to be a policeman (*Souder v. Philadelphia*; 305 Pa. 1, 156 A. 245; *McAuliffe v. Mayor*, 155 Mass. 216, per Mr. Justice Holmes), or to be a teacher, or to teach or conduct himself in a manner which is validly prohibited.

For example, a State or City can validly and constitutionally require its teachers and other employes do disclose under oath their past and present membership in the Communist Party or their past and present Communist political associations; and a municipal ordinance requiring municipal employes to take oath that they had not, during five preceding years, advocated or *knowingly* belonged to an organization advocating overthrow of our government by force and violence is constitutional: *Garner et al. v. Board of Public Works of Los Angeles*, 341 U. S. 716; *Adler v. Board of Education of City of New York*, 342 U. S. 485; *Albert Appeal*, 372 Pa. 13, 92 A. 2d 663; Cf. also, *Wieman v. Updegraff*, 344 U. S. 182. In the *Adler* case the Court said, inter alia (page 492):

"'. . . Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment.' 341 U. S. at page 720, 71 S. Ct. at page 912.

"We adhere to that case [Garner v. Board, 341 U. S., supra]. A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty

of such persons, from considering the organizations and persons with whom they associate."

In *Albert Appeal*, 372 Pa., supra, this Court, speaking through Chief Justice STERN, wisely said (page 19): "In short, it is essential, in order to protect our children from treacherous influences, that persons who advocate or participate in subversive doctrines should not be employed, or if employed should not be retained, as teachers in our public schools, and any teacher dismissed for such a reason cannot properly claim that any constitutional or legal right is thereby violated."

It is clear, therefore, that the Legislature or municipality or school district has a right to impose reasonable provisions and reasonable limitations upon those desiring to teach in a public school. It is likewise clear that the questions propounded to Beilan by Dr. Hoyer, Superintendent of Philadelphia Public Schools, as to his past Communistic associations were relevant and proper, although Beilan's *refusal to answer* questions of the Un-American Activities Committee (of the House of Representatives) as to his past Communistic activities and associations, was apparently, (a) insufficient to justify his dismissal as a teacher and (b) irrelevant in this proceeding: *Slochower v. Board of Education* (New York), 350 U. S. 551 (1956). It is not necessary to decide whether *past* Communistic activties and associations,—which Beilan, in the eyes of the community, although not in law[1] admitted

1. See majority and dissenting opinions in *Slochower v. Board of Education* (New York) 350 U. S., supra. In that case Mr. Justice REED, with whom Mr. Justice BURTON and Mr. Justice MINTON joined, said in his dissenting opinion: "The fact that the witness has a right to plead the privilege against self-incrimination protects him against prosecution but not against the loss of his job."

In *Brown v. Walker*, 161 U. S. 591 (1896), the Supreme Court of the United States at pp. 605-606 stated: "The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good."

by refusing to answer questions pertaining thereto,—would be sufficient of themselves to justify dismissal if he had sincerely repented and is no longer a Communist, or participating in un-American activities or advocating subversive doctrines.

We are apt to forget that from 1933 when the President of the United States recognized Communist Russia, until the middle or late 1940's many of the highest political leaders of our Federal Government, many persons who were connected with the State Department, many members of labor unions, many Judges, and the so-called liberals, were strongly pro-Communist. The real nature [2] as well as the terrible menace and dangers of atheistic Communism were

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In *United States v. Mammoth Oil Co.*, 14 F. 2d 705 (CCA 8th 1926), affirmed 275 U. S. 13 (1927) there was a civil action by the United States for the cancellation of oil leases on the ground of a bribe to a high government official. One of the witnesses for the defendant oil company, a son-in-law of the guilty cabinet officer, invoked the Fifth Amendment. In the trial of the issue of fraud, the trial Judge ruled that no inference of fraud against defendant could be drawn from the refusal of the witness to testify on the plea of self-incrimination. The Court of Appeals in reversing the judgment of the District Court, held in an opinion by Judge KENYON, at page 729: "Why is silence the answer of a former cabinet officer to the charge of corruption? Why is silence the only reply of Sinclair, a man of large business affairs, to the charge of bribing an official of his government? Why is the plea of self-incrimination—one not resorted to by honest men—the refuge of Fall's son-in-law, Everhart? . . . Men with honest motives and purposes do not remain silent when their honor is assailed. . . . Is a court compelled to close its eyes to these circumstances? . . . These gentlemen have the right to remain silent, to evade, to refuse to furnish information, and thus to defy the government to prove its case; but a court of equity has the right to draw reasonable and proper inferences from all the circumstances in the case, and especially from the silence of Secretary Fall and the failure of Sinclair to testify."

2. Communism is a world-wide revolutionary movement to overthrow, by force, violence or sabotage, the government of every nation and to establish a Communist dictatorship therein. Having formed an organization to combat Communism as early as 1935, I know something about it and the actions of those who were deluded by the professed objectives of Stalin and his fellow travelers viz. a government of, by and for the proletariat with peace and prosperity. Even today the menace of Communism is not fully appreciated by many influential Americans.

not comprehended by these people, who gullibly treated and portrayed Communists as genuine democrats or, in the case of China, as agrarian reformers. Moreover, the Communist Party was recognized as a political party in Pennsylvania until it was outlawed and abolished by the Act of December 21, 1951, P. L. 1712.

That brings us to the main question here involved: What are the grounds and the procedure which the Legislature has prescribed for the removal of a teacher, and more particularly: Did Beilan's conduct amount to "incompetency" for which he could be discharged under the Teachers Tenure Act.

The teaching profession, in order to secure tenure and "to preserve the system of employment in the educational field free from any [arbitrary or political] interference" (*Teachers Tenure Act Cases*, 329 Pa. 213, 222, 197 A. 344), induced the Legislature to pass the Teachers Tenure Act.[3] The Tenure Act placed specific and "emphatic limitations" on the removal of teachers. The Tenure Act provided—*prior to March 1949*—that a teacher's contract of employment could be terminated on any one—and impliedly and necessarily on only one or more—of the following seven grounds: "Immorality, *incompetency*, intemperance, cruelty, persistent neglect, mental derangement, and persistent and willful violation of the school laws of this Commonwealth". The Act conspicuously failed to mention as a ground for dismissal, Communism or un-American or subversive activities or doctrines; and nowhere is the Board authorized to dismiss a teacher for exercising his Constitutional privilege of refusing to answer incriminating questions about his past Communistic activities or associations.

On March 10, *1949*, the Teachers Tenure Act was amended to include as an *additional* cause for dismissal "*advocation of or participation in un-American or subversive doctrines*". That would clearly indicate that in

3. Act of May 18, 1911, P. L. 309, § 1205, as amended by Act of June 20, 1939, P. L. 482, § 2.

the mind of the Legislature (a) "incompetency" did not, prior to 1949, include "advocation of or participation in un-American or subversive doctrines", and (b) that said amendment of 1949 was necessary if a teacher was to be discharged on those grounds. *If that were not so, there would have been no reason or necessity for the 1949 amendment.*

But the Legislature went further. The Legislature passed the Act of December 22, *1951*, P.L. 1726, 65 PS § 211, popularly called the Pechan Act, but more accurately known as the Pennsylvania Loyalty Act, the constitutionality of which was sustained in *Fitzgerald v. Philadelphia*, 376 Pa. 379, 102 A. 2d 887. That important patriotic Act prescribes in § 17 the procedure; as well as the substantive law, governing the removal of a disloyal or subversive teacher: ". . . If after due hearing it is determined by the appointing authority *by a fair preponderance of the evidence* that the person who has been so notified is a subversive person as defined in the Act, the person who has been so notified shall be discharged." For reasons best known to the Legislature, the Loyalty Act specifically and unwisely *repealed* the *1949* amendment of the Teachers Tenure Act, which as we have seen had authorized dismissal of a teacher for "advocation of or participation in un-American or subversive doctrines." It is clear therefore that the Legislature intended (a) that a subversive teacher could be discharged only under the Loyalty Act, and (b) indicated (for the second time) that the word "incompetency" in the Tenure Act was not intended to include "advocation of or participation in un-American or subversive doctrines".

Our conclusion is fortified and buttressed, though it is not necessary to do so, by the further fact that Senator Pechan, the author of the Loyalty Act of 1951, introduced in the 1953 Session of the Legislature, Senate Bill No. 94, and in the 1955 Session, Senate Bill No. 22, each of which provided for the removal of public servants who refused to

testify on Constitutional grounds, viz., under the privilege of the Fifth Amendment—and the Legislature refused to pass the Bills. It seems to me evident that the Legislature of Pennsylvania has clearly provided that a person can be dismissed as a teacher for un-American activities or advocation of subversive doctrines only when the charge is made under the Loyalty Act and the appointing authority proves such charges, not by defendant's refusal to testify, but by a fair preponderance of the evidence.

The foregoing reasons make evident why I must regretfully dissent from the majority opinion.

ORDER.

The order of the court of common pleas is reversed and the order of the State Superintendent of Public Instruction affirming appellee's dismissal by the Board of Public Education is sustained at the cost of appellee.

ORDER DENYING PETITION FOR REARGUMENT.

Now October 3, 1956 Petition denied.

PER CURIAM.

APPENDIX B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fourteenth Amendment—Due Process Clause.

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * * U. S. C. Const. Amdt. 14.

Acts of Assembly to Be Strictly Pursued.

In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect. 1806, March 21, P. L. 558, 4 Sm. L. 326, § 13. 46 Purdon's Pa. Stats. Ann. § 156.

Causes for Termination of Contract.

The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employe shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employe: Provided, That boards of school directors may terminate the service of any professional employe who has attained to the age of sixty-two.

Nothing within the foregoing enumeration of causes, shall be interpreted to conflict with the retirement of pro-

fessional employes upon proper evidence of disability, or the election by professional employes to retire during the period of voluntary retirement, or the authority of the board of school directors to require professional employes to retire during said period of voluntary retirement, or the compulsion on the part of professional employes to retire at the attainment of age seventy. 1949, March 10, P. L. 30, art. XI, § 1122; 1949, May 9, P. L. 939, § 4. 24 Purdon's Pa. Stats. Ann. § 11-1122.

Rating System.

In determining whether a professional employe shall be dismissed for incompetency, the professional employe shall be rated by an approved rating system which shall give due consideration to personality, preparation, technique, and pupil reaction, in accordance with standards and regulations for such scoring as defined by rating cards to be prepared by the Department of Public Instruction, and to be revised, from time to time, by the Department of Public Instruction with the cooperation and advice of a committee appointed by the Superintendent of Public Instruction, including representation from county and district superintendents of schools, classroom teachers, school directors, school supervisors, and such other groups or interests as the Superintendent of Public Instruction may deem appropriate. 1949, March 10, P. L. 30, art. XI, § 1123. 24 Purdon's Pa. Stats. Ann. § 11-1123.

Ineligibility for Employment or Appointment to Office.

No subversive person, as defined in this act, nor any person as to whom on all the evidence there is reasonable doubt concerning his loyalty to the government of the United States or the Commonwealth of Pennsylvania, shall be eligible for employment in or appointment to any office or any position of trust or profit in the government of

or in the administration of the business of this Commonwealth, or of any school district, county, municipality or other political subdivision of this Commonwealth. 1951, Dec. 22, P. L. 1726, § 3. 65 Purdon's Pa. Stats. Ann. § 213.

Present Employes; Oath; Discharge.

The appointing authority of each person, including teachers and other employes of the public school system who, on the first day of March, one thousand nine hundred fifty-two, shall be in the employ of the Commonwealth of Pennsylvania or of any of its political subdivisions, other than those holding State or local elective offices of any kind, shall require such person to, and every such person shall, on or before the first day of April, one thousand nine hundred fifty-two, make a written statement, under oath or affirmation, which statement shall contain notice that it is subject to the penalties of perjury, and shall be in the following form:

"I, ...; do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth, and that I will discharge the duties of ..... with fidelity.

"And I do further swear (or affirm) that I do not advocate, nor am I knowingly a member of any organization that advocates, the overthrow of the government of the United States or of this Commonwealth by force or violence or other unconstitutional means, or seeking by force or violence to deny other persons their rights under the Constitution of the United States or of this Commonwealth.

"And I do further swear (or affirm) that I will not so advocate nor will I knowingly become a member of such organization during the period that I am an

employe of the Commonwealth of Pennsylvania (or political subdivision thereof)."

Any persons failing or refusing to execute either statement required hereby shall be discharged immediately by the proper appointing authority. 1951, Dec. 22, P. L. 1726, § 5. 65 Purdon's Pa. Stats. Ann. § 215.

Investigations.

Any appointing authority may at any time, upon written complaint, investigate any person, including teachers and other employes of the public school system, appointed or employed by him, to determine whether he is a subversive person. If, upon any investigation, it appears that such person is a subversive person, the person shall immediately be privately and confidentially notified of the recommendation by the appointing authority. No public announcement, release, statement or comment concerning the investigation, recommendation or notification shall be made by the appointing authority in any way whatsoever, unless and until the person so notified is discharged under section seven of this act. 1951, Dec. 22, P. L. 1726, § 6. 65 Purdon's Pa. Stats. Ann. § 216.

Hearing Before Appointing Authority.

Any person, including teachers and other employes of the public school system, who has been so notified under this act, shall have a right to a hearing before the proper appointing authority within thirty (30) days after receiving said notification. If no hearing is requested within thirty (30) days after said notification is received, the person shall immediately be discharged by the appointing authority. He may appear before such appointing authority personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf through witnesses. The person who has been so

notified shall at the same time be further informed in writing of such hearing, at least ten days before the day set for the hearing, and shall be informed therein of the nature of the charges against him; and the person who has been so notified shall be informed in the notice (1) of his right to reply to such charges in writing within ten days after the date of service, (2) of his right to a hearing on such charges before the appointing authority, which hearing may be private and confidential or may be public, at the option of the person so notified, and (3) of his right to appear before such appointing authority personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his own behalf through witnesses. If, after due hearing, it is determined by the appointing authority by a fair preponderance of the evidence that the person who has been so notified is a subversive person, as defined in this act, the person who has been so notified shall be discharged; otherwise, the recommendation shall be ignored. Said determination shall be made within sixty (60) days after the hearing. If the appointing authority shall be comprised of three or more members, a vote of two-thirds of the members shall be necessary in order to discharge a person. 1951, Dec. 22, P. L. 1726, § 7. 65 Purdon's Pa. Stats. Ann. § 217.

Appeals to the Superintendent of Public Instruction.

After a final determination of discharge under this act by an appointing authority, any teacher or other person employed in the public school system of the Commonwealth who believes himself aggrieved by such determination may appeal on the record from the determination by an application in writing to the Superintendent of Public Instruction of the Commonwealth within twenty days after receiving written notice of such determination. The superintendent shall set a time and place for the hearing of the appeal, which hearing shall be not more than thirty (30)

days after receipt thereof, and give due notice of said hearing to the appellant and to the appointing authority whose determination is under review. The hearing shall be held by the superintendent or by a person or persons, not exceeding three, designated by the superintendent in writing to hear the appeal in his behalf. The superintendent, in his discretion, may designate such person or persons to hear such appeal and to report to him. The persons so designated by the superintendent may be officers or employes of the civil service of the Commonwealth. The person or persons holding the hearing may make such inquiry as may be deemed advisable. Within sixty (60) days after the hearing on appeal, the superintendent shall affirm or reverse the findings and determination under review, and, in the case of reversal, shall order the reinstatement of the appellant, who shall be entitled to back pay from the date of his discharge. 1951, Dec. 22, P. L. 1726, § 10. 65 Purdon's Pa. Stats. Ann. § 220.

Effect and Applicability of Act.

(a) The provisions of this act shall not affect the right to discharge any person for any cause other than those provided for by this act or without cause under existing law. No procedure provided by any existing tenure or civil service law shall be applicable in any proceeding under this act. 1951, Dec. 22, P. L. 1726 § 15(a). 65 Purdon's Pa. Stats. Ann. § 225(a).

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IN THE

Supreme Court of the United States

October Term, 1956.

No. [redacted]63

BOARD OF PUBLIC EDUCATION,
SCHOOL DISTRICT OF PHILADELPHIA

v.

HERMAN BEILAN,

Petitioner.

On Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR PETITIONER.

JOHN ROGERS CARROLL,
2015 Land Title Bldg.,
Philadelphia 10, Pa.,
A. HARRY LEVITAN,
1412 Fox Bldg.,
Philadelphia 3, Pa.,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 668.

BOARD OF PUBLIC EDUCATION
SCHOOL DISTRICT OF PHILADELPHIA

v.

HERMAN BEILAN,

Petitioner.

ON CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinions of the Supreme Court of Pennsylvania and the order denying reargument are reported at 386 Pa. 82; 125 A. 2d 327, and are printed at R. 113 et seq. The Opinion of the Court of Common Pleas of Philadelphia County, the Opinions of the Superintendent of Public Instruction of the Commonwealth of Pennsylvania, and the Order of the Board of Public Education are unreported and are printed at R. 76-104.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered June 25, 1956; the Order Denying Reargument was entered October 3, 1956. The Petition for Certiorari was filed December 28, 1956, within the ninety-day period allowed by 28 U. S. C. § 2101 (c). Certiorari was granted on May 20, 1957, 353 U. S. (Adv.) 964. The jurisdiction of this Court is invoked under Title 28 U. S. C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The citations of the constitutional and statutory provisions involved are noted below. Their full text is printed as Appendix A.

Due Process Clause
U. S. C., Const. Amendment 14.

Statutory Remedies Act
Act of 1806, March 21, P. L. 558; 4 Sm. L. 13; 46 Purdon's Pa. Stats. Ann. § 156.

Teachers' Tenure Act
Act of 1949, March 10, P. L. 30, Art. XI, §§ 1122, 1123; 1949, May 9, P. L. 939, § 4; 24 Purdon's Pa. Stats. Ann. §§ 11-1122, 11-1123.

Pennsylvania Loyalty Act
Act of 1951, Dec. 22, P. L. 1726, §§ 3, 5, 6, 10, 15a; Purdon's Pa. Stats. Ann. §§ 213, 215, 216, 220, 225a.

QUESTION PRESENTED.

Is it a violation of the Due Process provision of the Fourteenth Amendment for a state to dismiss a public school teacher on the alleged ground of incompetency under the following circumstances:

(a) Where the only evidence of incompetency is the teacher's refusal in 1952 to answer a question asked by the District Superintendent of Schools about his membership in the Communist Political Association in 1944;

(b) Where the association which is the subject of the question, was entirely lawful for public employees at the time it was alleged to exist;

(c) Where the refusal to answer is made in good faith and upon advice of counsel that the law prohibits the questioning of teachers on their political beliefs;

(d) Where no statute, ordinance or regulation provides that such refusal to answer may be grounds for dismissal;

(e) Where the exclusive provisions of state law providing for investigation of and dismissal for subversive activity are ignored by the school authorities; and

(f) Where the dismissal proceedings, on the alleged ground of incompetency, are such as to make the character of the dismissal appear to be for disloyalty and the teacher is given no hearing on the issue of his loyalty.

STATEMENT OF THE CASE.

Petitioner was appointed a public school teacher in Philadelphia on February 17, 1930 (R. 16). For twenty-three years thereafter, he was continually so employed and continually rated competent in accordance with the official rating system of the Board of Public Education (Petitioner's Exhibit 1, R. 74). On June 25, 1952, pursuant to written instructions (Bd.'s Ex. 1, pp. 17, 21), he appeared in the Superintendent's office for an interview. This meeting was also attended by associate counsel for the Board of Public Education (R. 63). The Superintendent informed petitioner that he had received information relating to petitioner's alleged association with Communist organizations. The Superintendent said that he wanted to question petitioner about this information (R. 17, 18). Petitioner asked the Superintendent to disclose the information and the Superintendent declined to do so, but did ask one question, to wit: whether petitioner had been Press Director of the Professional Section of the Communist Political Association in 1944 (R. 19). Petitioner asked leave to consult

counsel. This was entirely satisfactory to the Superintendent and the meeting terminated (R. 19).

On October 14, 1952, the Superintendent again requested petitioner's presence in his office. Petitioner appeared and informed the Superintendent that he had consulted counsel who advised him that he could not legally be asked questions concerning his religious or political beliefs (R. 21). The Superintendent informed petitioner that this was a serious matter and his refusal to answer might lead to his dismissal. Petitioner, nevertheless, declined to answer the question which had been asked or questions of that type (R. 22). At that point the matter was dropped and lay dormant for thirteen months during which time petitioner continued to teach and continued to be rated competent.

On November 16-18, 1953, a subcommittee of the Committee on Un-American Activities of the United States House of Representatives held public, televised hearings in Philadelphia to which a large number of Philadelphia public school teachers and others were subpoenaed. Petitioner appeared before the subcommittee in response to its subpoena and was questioned about his past association with Communist organizations (R. 24-36). He stated that he was not then a member of the Communist Party, and that he had never advocated overthrow of the Government by illegal means (R. 34, 35), but he invoked the Fifth Amendment with respect to all other questions. He offered to discuss his own activities fully, provided the subcommittee would agree not to question him about other persons. The subcommittee chairman refused this offer, saying that the committee did not make "deals" with witnesses (R. 31).

On November 23, 1953, the Superintendent publicly announced the suspension of petitioner and twenty-five other teachers similarly situated.

Subsequently, the Superintendent preferred formal charges of "incompetency" and "persistent and wilful violation of the school laws" against petitioner, alleging as

the basis for both charges his refusal to answer the question asked by him, as well as petitioner's plea of the Fifth Amendment before the Congressional committee (R. 2-4).

A hearing was held on these charges before the Board of Public Education on December 22, 1953. The Superintendent was the Board's only witness. He testified to the facts related above.

The Superintendent also testified to the following significant facts: He stated that his reason for summoning petitioner to the interview was that he had information from an "unimpeachable" source relating to petitioner's loyalty, which information he considered to be "totally disqualifying" if true, and he wanted to ascertain its truth from petitioner (R. 17, 18). He acknowledged that all of the information in his possession and all of his intended questions related to Communist associations (R. 47).

The Superintendent also testified that, because of petitioner's refusal to answer his question in October, 1952, he then thought petitioner incompetent (R. 52, 59). Nevertheless, he did not inform the principal of the school in which petitioner taught (R. 59, 60), and took no action for more than thirteen months, i. e., until five days after the visit of the House Un-American Activities Committee to Philadelphia.

At the hearing, counsel for the Board conceded that petitioner's competency as a teacher was not in question (R. 53). He also acknowledged that with respect to the charge of persistent and wilful violation of the school laws, he knew of no school law which petitioner could be considered to have violated (R. 9).

Petitioner was present at the hearing and did not testify, nor did he decline to testify.[1] At the close of the hearing, counsel for petitioner stated that he was unable to

1. At the close of the hearing, one member of the Board stated a desire to question the teacher. Another member objected. Petitioner did not object. After some discussion among the members of the Board, the question was withdrawn (R. 70).

present evidence on the charge of persistent and wilful violation of the school laws because he could find no applicable school law (neither could counsel for the Board—R. 9) and that the evidence as to competency—twenty-three years of satisfactory ratings, the last of which followed petitioner's suspension by ten days—had already been presented in the Board's case (P.'s Ex. 1, P. 74), and that, since the actual character of the proceedings was an inquiry into loyalty, petitioner was entitled to a hearing under the Pennsylvania Loyalty Act. Counsel for petitioner invited the Board to undertake such a proceeding (R. 65, 66).

On January 7, 1954, a resolution of the Board of Education in the exact language of the charges was adopted by the Board by a vote of 14 to 1[2] (R. 75). Petitioner appealed to the Superintendent of Public Instruction of the Commonwealth of Pennsylvania, who sustained the dismissal on the grounds charged by the Board. This decision was reversed by Court of Common Pleas No. 6, Philadelphia County, in an unanimous decision. The Court of Common Pleas was, in turn, reversed by the Supreme Court of Pennsylvania which, by a vote of 4 to 2, sustained the dismissal on the sole ground that the charge of incompetency was sustained by the evidence of petitioner's refusal to answer the Superintendent of Schools.[3] Upon the issue thus narrowed[4] by the decision of the Pennsylvania Supreme Court, this Court granted certiorari, 353 U. S. (Adv.) 964, 77 S. Ct. (Adv.) 1047.

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2. The only dissenting vote was cast by the President, Walter Biddle Saul, Esq.

3. This is explained in part by the decision of this Court in *Slochower v. Board of Higher Education of New York*, 350 U. S. 551, which was decided while the instant case was before the Supreme Court of Pennsylvania.

4. It is interesting to note that the Court below was not quite so circumspect in the companion case of *Kaplan v. Philadelphia School District*, 388 Pa. (Adv.) 213, 226; 130 A. 2d 672, where it sustained both the ground of incompetency and of persistent and wilful violation of the school laws as its basis for suspension without pay pending the teacher's dismissal.

SUMMARY OF ARGUMENT.

It may be helpful to suggest preliminarily a number of issues previously considered by this Court which we believe are not involved in this case:

1. We concede at the outset the right of a state to dismiss from its employ persons who are shown in proper proceedings by competent evidence to be knowing members of subversive organizations. *Adler v. Board of Public Education of New York*, 342 U. S. 485; *Albert Appeal*, 372 Pa. 13, 92 A. 2d 663.

2. This Court has also held it permissible for state authorities to dismiss public employees for refusal to disclose knowing membership in known subversive organizations during a period in which such membership had *expressly been made unlawful* by City Charter for public employees. *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716.

3. It has also been established that a state may refuse public employment to those unwilling to swear that they are not at the time of their election or employment members of subversive organizations in which public employees are prohibited to participate. *Gerende v. Board of Supervisors*, 341 U. S. 56; *Fitzgerald v. Philadelphia*, 376 Pa. 379, 102 A. 2d 887.

4. Nor is this a case wherein a state has attempted, by virtue of a specific rule or regulation, to exclude from public employment those who refuse to testify about subversive activities. *Slochower v. Board of Higher Education*, 350 U. S. 551; *Board of Education v. Wilkinson*, 125 Cal. App. 2d 100, 270 Pac. 2d 82.

5. Nor is this a case in which the teacher had no tenure rights or was hired at the *discretion* of the school authori-

ties. *Faxon v. School Committee of Boston*, 331 Mass. 531, 120 N. E. 2d 772.

The issues in the case at bar, as distinguished from those mentioned above are, we believe, as follows:

1. May the Board of Education consistently with Due Process of Law infer incompetency from the refusal to answer a question?

2. Does dismissal for refusal to answer questions in an inquiry, whose authorization lies solely in an alleged traditional power of the Superintendent of Schools to "weed out unfit school teachers", violate due process because of

(a) its invasion of freedom of association without either ascertainable pertinency to that authorization or ascertainable relationship to a significant state interest; and

(b) its punishment of apparently innocent conduct without prior warning of the consequences of such conduct.

3. Does a dismissal under the stigma of disloyalty without a hearing on the issue of loyalty violate the constitutional rights of a public school teacher with tenure?

Our argument on these issues may be summarized as follows:

I. Petitioner's Refusal to Answer the Superintendent's Question Does Not Warrant the Inference of Incompetency.

A. Petitioner in good faith and upon advice of counsel refused to answer upon the ground that § 108 of the School Code of Pennsylvania [5] prohibits inquiry into the political affiliations of Pennsylvania school teachers. There neither was, nor is, any law of Pennsylvania authorizing a Superintendent of Schools to compel disclosure of teachers' political

5. Fn. 14, *infra*, p. 16.

affiliations and the Superintendent asserted no such statutory authority. The affiliation about which the Superintendent inquired was entirely lawful for public employees at the time of petitioner's alleged membership.

(1) Petitioner's refusal under these circumstances does not justify an inference of disloyalty, past or present, for the same reasons that a plea of the Fifth Amendment does not justify such an inference. *Konigsberg v. State Bar of California*, 353 U. S. (Adv.) 252; *Slochower v. Board of Higher Education*, 350 U. S. 551; *Wieman v. Updegraff*, 344 U. S. 183.

(2) Petitioner's refusal to answer does not permit an inference of dishonesty because he told no lies and his refusal was made in good faith and reliance on advice of counsel.

(3) Nor does this refusal warrant any inference of lack of civic responsibility since petitioner simply obeyed the law which is the true measure of his duty.

(4) Nor can there be a justified inference of lack of cooperation because the Board could not legally require cooperation in an inquiry made without any legislative authorization under circumstances depriving petitioner of all possible procedural protections, particularly since the inquiry was solely a seeking for corroboration of information already in the possession of the Superintendent of Schools, relating to affiliations in the remote past, which affiliations involved no dangerous or subversive activities. *Sweezy v. New Hampshire*, 354 U. S. (Adv.) —, 77 S. Ct. (Adv.) 1203; *Watkins v. United States*, 354 U. S. (Adv.)—, 77 S. Ct. (Adv.) 1173.[6]

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6. In 1950, the Supreme Court of Pennsylvania held:

"For one to favor a 'little communism' does not mean that he favors the overthrow of our government by force or that he endorses any other illegal, immoral or unpatriotic program. On October 28, 1946 when the alleged libel was published, the relations between the United States and Russia were very friendly

B. The fact that the respondent Board took no action against petitioner for thirteen months following his refusal and in the meantime permitted him to be officially rated a satisfactory teacher amounts to an admission on the part of the Board that his refusal did not render him incompetent. He was really suspended and dismissed after and because of his plea of the Fifth Amendment before the House Un-American Activities Committee, which was removed from the case much later by reason of this Court's decision in *Slochower v. Board of Higher Education of New York*, 350 U. S. 551, which was decided while this case was pending in the Pennsylvania Supreme Court.

Because of petitioner's statutory tenure rights, the Board had the burden of proving incompetency and since petitioner's contract with the school system at the time of the alleged association involved no obligation on his part either to avoid Communist organizations or to disclose past membership in them, his refusal to do so cannot be regarded as a breach of his contractual duty, and therefore it cannot provide sufficient evidence or, indeed, any evidence to sustain the Board's burden of proving incompetency (*Compare Konigsberg v. California State Bar Examiners*, 353 U. S. (Adv.) 252 where the burden was upon the applicant).

II. Dismissal of a School Teacher for Refusal to Cooperate in an Investigation Which Has No Legal Authorization Violates Due Process Because (a) It Is an Unjustified Invasion of Freedom of Association, and (b) It Punishes Apparently Innocent Conduct Without Prior Warning.

A. Inquiry into and compulsory disclosure of past political associations invades the freedom of association

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and the public mind had not then identified communism with Russian imperialism and terrorism.

. . . The Communist party and the Socialist party have had legal recognition in this country and in several campaigns they have nominated candidates for the presidency and these candidates have received many votes. The platforms of neither of these parties advocate anything unlawful."

because it acts as a prior restraint on future association, and the disclosure of unpopular associations tends to coerce individuals toward conformity and orthodoxy, not only in association but in belief and expression as well.

The asserted authorization for the inquiry in this case is found in the mandate of the Pennsylvania Constitution that the Legislature maintain a thorough and efficient system of public schools. The Legislature has not seen fit to implement this constitutional provision by any specific authorization of the investigation here involved. The resulting constitutional vices are as follows:

(1) The vagueness of the asserted authority aggravates the invasion of freedom because it gives unlimited scope to the investigation. Vagueness also prevents rational determination by the witness and by a reviewing court of the pertinency of the questions asked to that authority. It likewise prevents determination of the propriety of the inquiry in relation to its governmental purpose. Such inquiries, authorized in such broad terms, have been held invalid in *Watkins v. United States, supra; Sweezy v. New Hampshire, supra; Raley v. Ohio*, 354 U. S. (Adv.) —, 77 S. Ct. (Adv.) 1391; *Morgan v. Ohio*, 354 U. S. (Adv.) —, 77 St. Ct. (Adv.) 1403. The absence of specific authority in this case brings it within the condemnation of those decisions.

(2) The interest of the state, either in self-protection or in the maintenance of a thorough and efficient public school system does not justify this invasion because (a) the danger of harm from the asserted evil, which is the object of the inquiry, is too remote in the absence of any charge of insidious teaching or any evidence thereof, and (b) the danger to freedom resulting from inquiry into political association and the attendant pressures toward conformity among school teachers are antithetical to democratic education, which demands freedom rather than orthodoxy. *Sweezy v. New Hampshire, supra.*

B. Dismissal for apparently innocent conduct without prior warning of the consequences is fundamentally unfair.

(1) The legislative situation in Pennsylvania as it existed at the time of the inquiry created a trap for petitioner. The Board of Education proceeded against him under the Teachers' Tenure Act. In 1949, the Legislature had added subversive activities as a ground for dismissal under the Teachers' Tenure Act. In 1951 the Legislature repealed this provision and enacted in its stead a comprehensive and exclusive statutory scheme for the investigation and processing of cases involving subversive activities of public employees.[7] The Board of Education in this case concedes that it did not have such information against petitioner as would warrant the initiation of proceedings under the Loyalty Act,[8] and so it ignored the Loyalty Act and proceeded instead under the Tenure Act, notwithstanding the repeal of its subversive provision.

The Board had insufficient evidence of disloyalty, and so it charged petitioner with incompetency of which it had no evidence.[9]

(2) Petitioner having complied with all the requirements of the Loyalty Act [10] justifiably believed he was entitled to rely upon the legal prohibition against political tests for school teachers. He therefore refused to answer the Superintendent's question. To dismiss him for this conduct in the absence of any warning by statute, rule or regulation is fundamentally unfair. It is also discriminatory because it allowed the Board to deprive petitioner of all the procedural protections of the Pennsylvania Loyalty Act and, in fact, vests unbridled discretion in each of the

7. The pertinent provisions of the Pennsylvania Loyalty Act are quoted in the Appendix.

8. Cf. fn. 29, *infra* p. 26.

9. Cf. P's Ex. 1, R. 74, which shows twenty-three years of satisfactory ratings, some of which are after the conduct which is now said to show his incompetency.

10. See fn. 6, *supra* pp. 9-10.

hundreds of school boards of the Commonwealth either to grant or deny to their professional employees the rights granted by that Act.

Membership in the Communist Political Association, the Communist Party and other organizations now believed to be subversive, was entirely lawful in Pennsylvania for public employees and all others during the entire period of petitioner's alleged affiliations.[11] It is unfair for the state to insist in 1952, that an individual employee ought to have recognized in 1944 a danger which the state itself had not legislatively recognized.

III. Dismissal Under a Stigma of Disloyalty Without a Hearing on Loyalty is a Deprivation of Liberty and Property Without Due Process of Law.

A. Petitioner's dismissal carries such a stigma. Although the Board of Education steadfastly maintains that this was not a loyalty proceeding, petitioner was undeniably discharged because of his suspected disloyalty. The economic consequences of such a discharge and the opprobrium to which it subjects the employee make it imperative that he be granted a hearing on the issue of his loyalty before such action is taken against him. This was denied him.

B. Whatever the motivation for the dismissal, it is as much a penalty as the dismissal for refusal to take the loyalty oath which this Court condemned in *Wieman v. Updegraff*, 344 U. S. 183. The Board's contention that petitioner was granted a hearing on competency is *unavailing* because:

(1) As a matter of fact petitioner had no such hearing. On the contrary, since petitioner had for twenty-three years consistently been rated competent and since his pedagogical

11. Fn. 6 *supra* pp. 9-10.

competency under the state rating system was conceded by the Board, the so-called competency hearing was a sham.

(2) The denial of a hearing on loyalty in this case is no less a deprivation of procedural due process of law than the similar proceedings condemned in *Slochower v. Board of Higher Education*, 350 U. S. 557 and *Wieman v. Updegraff*, 344 U. S. 183.

In short, petitioner was dismissed because of suspected disloyalty on the ground of incompetency without any evidence either of disloyalty or of incompetency and without a hearing on either loyalty or competency when the uncontroverted evidence, in fact, shows him to be both loyal and competent. This result was accomplished in disregard of and, in fact, in violation of the Pennsylvania Loyalty Act.

The investigation, and the dismissal for failure to cooperate in it, proceeded from the state's concern with subversion, which, in the absence of any evidence of such danger is insufficient to warrant compulsory disclosure of past innocent political associations, because such disclosure restricts free association, expression and belief and its tendency toward compelled conformity is detrimental to the very educational process it pretends to protect.

Hence, the decision below should be reversed.

ARGUMENT.

I. Refusal to Answer a Question as to Past Political Association Is Not Rational Evidence of the Incompetency of a Public School Teacher and Dismissal Upon That Ground Is Arbitrary and Discriminatory.

A. The Evidence.

The evidence shows that for thirteen months after petitioner's refusal to answer the Superintendent's question, the Board took no action. It shows that he was not charged with this refusal alone; rather, both the occasion and a major reason for petitioner's discharge was his appearance and plea of the Fifth Amendment before the House Un-American Activities Committee. The Fifth Amendment was an important element of the charges throughout all of the proceedings below until this Court decided *Slochower v. Board of Higher Education of New York*, 350 U. S. 551. That decision occurred between the argument and reargument of this case in the Supreme Court of Pennsylvania. It was only then and on that account (R. , 386 Pa. at p. 94) that the Fifth Amendment plea was eliminated from the case. The Board now finds itself in the position of attempting to sustain the dismissal upon what is really an afterthought in the charges against petitioner.

The question asked by the Superintendent is "Were you in 1944 Press Director of the Professional Section of the Communist Political Association?" (R. 19). In 1944, and until its outlawry by the Act of December 21, 1951, P. L. 1712 § 1 (18 Purdon's Pa. Stats. Ann. § 3811), the Communist Party was not illegal in Pennsylvania for public employees or others.[12] The Communist Political Associa-

12. Cf. Jones, C. J. dissenting, 386 Pa. 82, 103. (R.) and fn. 6 pp. 9-10 *supra*.

tion, which replaced the Communist Party from August, 1944 to July, 1945, has never been considered illegal.[13]

After the Superintendent asked his question, petitioner asked leave to consult counsel. This was granted. At the second interview three months later, he informed the Superintendent that counsel had advised him that he could not lawfully be asked questions concerning his political or religious beliefs.[14]

B. The Inferences.

In *Konigsberg v. State Bar of California*, 353 U. S. (Adv.) 252, this Court held, with respect to an applicant for the Bar, that an inference of bad moral character from refusal to answer questions relating to Communist associations was unwarranted. We submit, here, that for the reasons stated in the *Konigsberg* decision there is no permissible inference of incompetency from petitioner's refusal.

Respondent forswears any inference of disloyalty and relies upon inferences of dishonesty, lack of civic responsibility and lack of cooperation. None of these inferences is warranted.

1. *There Can Be No Inference of Disloyalty.*

First, we concur, of course, in the Board's disavowal of the inference of disloyalty.[15] It seems to us that this

13. *Dennis v. United States*, 341 U. S. 494, 498, Footnote 1.

14. This advice appears to have been sound indeed, for the School Code of Pennsylvania provides, "No religious or political test or qualification shall be required of any director, visitor, superintendent, teacher, or other officer, appointee or employe in the public schools of this Commonwealth." Act of 1949, March 10, P. L. 30, Art. I, § 108; 24 Purdon's Pa. Stats. Ann. § 1-108.

15. In its Brief in Opposition (hereafter referred to as Br. Opp.) to the Petition for Certiorari, the Board states, "The Board of Public Education did not base its finding of incompetency on any assumption or inference that the petitioner was disloyal, because he had refused to answer the questions relating to alleged former subversive activities." (p. 7)

refusal stands logically in the same posture as a refusal to answer on the ground of the Fifth Amendment. Since either an innocent or guilty man might refuse on the same ground, it is impossible to decide from the mere fact of refusal into which category the refusing individual falls. The reason stated by petitioner for his refusal to answer, to wit, that counsel had advised him that he could not legally be asked questions concerning his political or religious associations,[16] is strikingly similar to the reason given by Konigsberg for his refusal. The inference is equally unwarranted here.

2. *There Can Be No Inference of Dishonesty.*

Petitioner told no lies and evaded no questions. The record is devoid of any evidence to show that his answer was made in anything but good faith. Unlike *Konigsberg*, there is not even evidence that he answered the question at one point and later refused. The same may be said of his appearance before the Congressional Committee.[17] There, upon advice of counsel, petitioner refused to answer those questions as to which he believed the Fifth Amendment gave him the right; others he answered fully. In addition, he offered to discuss all of his own activities, but not those of other persons. The offer, of course, was declined (R. 31). Furthermore, he denied any present Communist Party membership (R. 34, 35). He had done the same thing in accordance with the requirements of the Pennsylvania Loyalty Act in 1952.[18] His position through-

16. Cf. Footnote 14, *supra*, p. 16.

17. Although this appearance has been eliminated as a basis for decision, it is nevertheless relied upon to some extent by the Court below. 386 Pa. 82; 125 A. 2d 327, *passim*. (R. 113, et seq.).

18. It should be noted that the oath required by the Pennsylvania Loyalty Act reads in the present tense and requires no information as to past beliefs or activities. Similarly, the criterion for dismissal under the Loyalty Act is whether or not the teacher is a subversive person *at the time of his hearing*. Act of 1951, Dec. 22, P. L. 1726, § 5, 65 Purdon's Pa. Stats. Ann. § 215 (App. 3a, 4a).

out was entirely consistent and perfectly honest, with respect for and reliance upon, the law.[19]

3. *There Can Be No Inference of Lack of Civic Responsibility.*

As to the inference of lack of civic responsibility, we submit that the law is the true measure of civic responsibility and that, since this teacher adhered, on advice of counsel, to the law which prohibits inquiry into a teacher's political activities, he cannot be said to be derelict in his civic responsibility. As Judge Lazansky, in a braver day, said in *Matter of Ellis*, 26 N. E. 2d 967, 282 N. Y. 435:

> "The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty."

Petitioner's statutory privilege places him in the same position.

4. *There Can Be No Inference of Lack of Cooperation.*

The inference of lack of cooperation is equally unfounded. Let us first consider: What was the cooperation demanded?

(1) We begin with the fact that the Superintendent already had the information which he sought from petitioner (R. 17, 18).

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19. An analogy may help: We are all familiar with the ancient and continuing debate as to whether the child who tells the unwelcome caller that her father is not at home, when she means "not at home to this caller", tells a lie. However we answer that question, no one could find any hint of dishonesty if the child were to say, "It's none of your business whether my father is at home." In the same fashion we deny the inference of dishonesty from petitioner's refusal to answer the Superintendent's question.

(2) All of that information had to do with alleged *past* subversive or Communist associations (R. 52, 59).

(3) The Superintendent refused petitioner's request to tell him what the information was or what the questions were which he proposed to ask (R. 19).

(4) Neither the Superintendent nor the Board to this day has advanced any specific statutory authority for the inquiry.

(5) The circumstances of the questionings, in the secrecy of the Superintendent's office and in the presence of associate counsel for the Board, with no apparent limitation on the subject matter, with no procedural protections for petitioner, enhance the unreasonableness of the required cooperation. Petitioner was alone and uncounseled. There was no available judicial protection for whatever rights he desired to assert. This inquiry, in fact, rather resembled a scene in a police interrogation room than any investigation known to the law.

Petitioner did not "cooperate" in this interrogation. Does the law require this cooperation? We respectfully submit that the decisions of this Court in *Watkins v. United States*, 354 U. S. (Adv.) —, 77 S. Ct. (Adv.) 1173; *Sweezy v. New Hampshire*, 354 U. S. (Adv.) —, 77 S. Ct. (Adv.) 1203; and *Raley v. Ohio*, 354 U. S. (Adv.) —, 77 S. Ct. (Adv.) 1931, compel the conclusion that the "cooperation" demanded cannot legally be required of a public school teacher.

The vices of this inquiry far exceed the mere matter of the breadth of its scope as in the cases just cited. The manner in which it was conducted adds such procedural defects as to make it intolerable in the light of the First and Fourteenth Amendments. Hence, there was no such lack of *legally required* cooperation as to allow the inference that petitioner failed to perform his duty as an employee of the public school system.

C. The Thirteen-month Delay Negates the Inference of Incompetency.

Petitioner's refusal occurred October 14, 1952. Nothing happened for thirteen months thereafter. Then, on November 16, 1953, came the House Committee, with its radio and television, cameras and microphones, reporters and photographers, crowds and headlines.[20] This spectacle was followed by demands for action from editorial writers and veterans' groups, and the Board promptly obliged. Five days after the hearings, twenty-six teachers were publicly, summarily suspended.

The Superintendent testified (R. 52, 59) that at the time of the refusal he thought petitioner was incompetent but took no action because of his consideration for the teachers involved (R. 59, 60). In view of the fact that he had all of the information before he began the inquiry in June, 1952, and that there was no change in circumstances from then until the visit of the House Committee, this explanation seems incomplete. The fact that he allowed satisfactory ratings to be entered on petitioner's record in the interim (P.'s Ex. 1, R. 74) shows that he did not seriously regard this refusal as a disabling factor.

D. The Narcotics Peddler Analogy Is Inapposite.

1. *The Distinction.*

Before leaving the question of permissible inferences from refusal to answer, we should deal with one hobgoblin constantly alluded to by the Board, the Court below and some proponents of the stealthy erosion of civil liberties. This is the hypothetical case of the Superintendent of Schools questioning a teacher about his association with persons distributing narcotics to school children. The conclusion is drawn that no thinking person with any feel-

20. Cf. Footnote 43, *infra* p. 38.

ing for the welfare and safety of our school children would for a moment permit reticence on such a question to go unpunished by summary dismissal. The argument then continues that, since Communism is equally abhorrent in American schools, recalcitrants on that subject should meet with the same fate.

Our position on this question is as follows:

First, we do not believe that a logical inference of guilt may be drawn from refusal to answer a question, no matter what crime is suggested by the question.

Second, we do not believe it is reasonable to say that refusal to answer a question proves a person dishonest, at least under circumstances where a specific legal prohibition against asking the question is invoked in good faith.

Third, when it comes, however, to the question of inferring lack of civic responsibility and cooperation from a school teacher's refusal to answer questions concerning dispensing narcotics to the students, the answer must be different. We believe that in such a case, this unfavorable inference is permissible because it may fairly be said that protection of school children is a part of the job of a school teacher.[21] It is one of the things which he has contracted to do for his employer. He has made no contract regarding his lawful political associations.

Fourth, the analogy is false: a proper analogy in the field of narcotics would be the question as to whether the teacher had been personally *an addict*, not whether he had imposed his addiction upon the children. There is a vast difference between a refusal to answer the question of

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21. It would be no different were a police officer to refuse to answer questions concerning crimes he was appointed to investigate. Cf. *Scholl v. Bell*, 125 Ky. 750, 102 S. W. 248 and *Souder v. City of Philadelphia*, 305 Pa. 1, 156 Atl. 245, which are constantly cited by respondent in support of its argument.

whether appellant *taught* Communism (sold dope) and whether he had *been a Communist* (an addict). By insistant thrusting forward of this dope peddler bogey, the School Board seeks to bridge the gap between legitimate state interest, justifying even interrogation, in what is *taught* and illegitimate compulsory disclosure of the personal infirmity of the teacher.

Furthermore, narcotics peddling can hardly be said to have the preferred position of political association and therefore the one who is questioned regarding narcotics has nothing to weigh in the balance against the obvious need to protect school children from drugs. On this basis we submit that the narcotics analogy does not apply here.

2. *The Garner Rationale Does Not Apply.*

But respondent answers that this Court has held:

> "A teacher works in a sensitive area in a school room. There he shapes the attitude of young minds towards the society in which he lives. In this the state has a vital concern. . . ." *Adler, et al. v. Board of Education of the City of New York*, 342 U. S. 485, 493.

Respondent therefore concludes that disloyalty is every bit as important as narcotics. We agree on the importance of loyalty but we submit that the Board's equation erroneously oversimplifies the problem. It ignores the fact that the affiliations here involved are not only legally important but also within the protection of the First Amendment and are not alleged as having any influence on petitioner's classroom conduct.

In the first place, the rationale of the *Adler* decision, repeated in *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716, 720 and *Gerende v. Board of Supervisors*, 341 U. S. 56, has been held to justify only *prospective legislation* specifically dealing with loyalty and it has

not been extended beyond *Adler, Garner* and *Gerende*. It has been unsuccessfully advanced as justification for the type of inquiry here involved in *Wieman, Watkins, Slochower* and *Sweezy*, all *supra*.

The importance of loyalty may indeed justify specific, prospective prohibition of association, but it is unfair to use it retroactively to punish apparently innocent association of whose dangers or subversive character the individual may well have been unaware.[22]

E. The Burden of Proof Is on Respondent.

We believe that this Court's Decision in *Konigsberg v. State Bar of California, supra*, justifies our position. But this case is even stronger for one further reason. Konigsberg, as the Court noted, was an applicant for admission for the Bar and, as such, had the *burden of proving* his good moral character to the State Bar Committee. In this case, we are dealing with a school teacher of twenty-three years standing who, by statute, has a contract with the Commonwealth of Pennsylvania which guarantees his academic tenure. Among the procedural incidents of tenure is the rule that in any dismissal proceeding, the burden of proof is upon the Board of Education.[23]

If Konigsberg's refusal to answer as to past and present Communist affiliations would not justify the suggestion that he had failed to sustain his burden of proof as to good moral character, then certainly petitioner's refusal to answer as to only past associations does not satisfy respondent's burden of proof that he is incompetent to teach.

For these reasons we submit that petitioner's refusal to answer the Superintendent's question does not allow an

22. "They had joined, (but) did not know what it was; they were good, fine young men and women, loyal Americans, but they had been trapped into it—because one of the great weaknesses of all Americans, whether adult or youth, is to join something." Testimony of J. Edgar Hoover, quoted by Mr. Justice Clark in *Wieman v. Updegraff*, 344 U. S. 183, 190.

23. *In re Swink*, 132 Pa. Super. 107, 200 Atl. 200.

inference of incompetency either directly or through the intermediate inferences of disloyalty, dishonesty, lack of civic responsibility or lack of cooperation and that the respondent has failed to sustain its burden of proving incompetency.

II. Dismissal for Refusal to Answer a Question in an Investigation Conducted Without Specific Legislative Authority and Without Warning of the Consequences of Such Refusal Violates Due Process.

A. Such an Inquiry Is an Unjustified Invasion of Freedom of Association.

This Court has held in *Watkins v. United States*, 354 U. S. (Adv.)—, 77 S. Ct. (Adv.) 1173; *Sweezy v. New Hampshire*, 354 U. S. (Adv.)—, 77 S. Ct. (Adv.) 1203; and *Raley, et al. v. Ohio*, 353 U. S. (Adv.)—, 77 S. Ct. (Adv.) 1931, that broadly based inquires in the area of free speech and association are improper because (1) the inquiry itself is a measure of governmental interference with the protected freedoms,[24] and in addition, (2) the vagueness of the investigator's authorization makes it impossible for the witness to determine the pertinency of the questions asked him,[25] or (3) for the Court to determine the propriety of the questioning in relation to its authorization or to a legitimate governmental purpose.[26]

Each of these vices is present in the case at bar.

1. *The Alleged Authority for the Investigation:*

Let us first consider the authority for this investigation. The Court below quotes with approval the authorization suggested in respondent's brief as follows, 386 Pa. at p. 90 (R.):

24. *Watkins v. United States*, 354 U. S. (Adv.) —, 77 S. Ct. (Adv.) 1173.

25. Id., *Sweezy, supra*, 77 S. Ct. 1203 at 1211.

26. Id., 77 S. Ct. 1203 at 1217-1218.

> " 'The State Constitution requires the General Assembly to maintain a thorough and efficient system of public schools. The School Code is the legislative implementation of this Constitutional duty. The rights and duties of a Superintendent have grown with custom and with professional usage. Many of his duties are imposed on him by tradition. It is one of his duties under the School Code to make sure that the teaching staff is competent, and therefore to weed out professionally unfit teachers. This is a continuing process that the Superintendent carries on. The Superintendent has the power and the duty, whenever the facts indicate the need, to inquire into and reevaluate the fitness of a teacher. Unquestionably there is a reciprocal duty on the part of the teacher to fully and frankly cooperate. He may not block such proper inquiry by secretiveness or concealment."

Thus, we see a "traditional" power of inquiry derived from the constitutional mandate to maintain a thorough and efficient system of public schools. The only limitation on the scope of the investigation is "fitness of the teacher".

Prior to 1949, the Teachers' Tenure Act contained no provision for discharge of teachers on account of subversive activities. In 1949, the Act was amended to add as a ground for dismissal "advocation (sic) of or participating in Un-American or subversive doctrines." In December, 1951, the legislature of Pennsylvania enacted the Pennsylvania Loyalty Act, known as the Pechan Act.[27] By § 16 of the Pechan Act, the legislature specifically repealed the 1949 amendment to the Teachers' Tenure Act, thus removing subversive activities as a ground for dismissal under that Act. The Pechan Act applies in terms to all "teachers and other employees of the Public School System", and, in addition, provides in § 15:

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27. Act of December 22, 1951, P. L. 1726, 65 Purdon's Pa. Stats. Ann. § 210-226.

"No procedure provided by an existing tenure or civil service law shall be applicable in any proceeding under this Act." [28]

The legislative situation, therefore, appears to be (1) that any authority previously to be found in the Teachers' Tenure Act for investigation of, or dismissal for, causes relating to subversive activities was repealed by the Pechan Act in 1951 and that all such authority has, since then, been found in the Pechan Act, which the Board of Education declined to follow.[29]

The Board thus finds itself in a legislative void concerning the authorization for this inquiry; and so it has been obliged to revert to the general school system provision of the Pennsylvania Constitution of 1874 [30] to find foundation for the investigation.

The relative vagueness of this authority and those considered in *Watkins, Sweezy, Morgan* and *Raley,* all *supra,* need not be labored. By comparison with those cases, we submit that the invasion of liberty is at least as great and the criterion of pertinency and necessity is far more vague.

2. *The End Does Not Justify the Means.*

Chief Justice Marshall, as long ago as *McCulloch v. Maryland,* 4 Wheat. 316 (1819), posited a basic test of the validity of governmental action infringing on individual liberty as a matter of *ends and means.* In that view, there

28. Act of 1951, P. L. 1726 § 15a, 65 Purdon's Pa. Stats. Ann. § 225a.

29. In its brief in the Court below, p. 8, the Board went so far as to say,

"Dr. Hoyer received information from responsible government officials that Mr. Beilan was, or had been, a member of the Communist Party over a period of years; the most recent date of such association being prior to the effective date of the Pennsylvania Loyalty Act. *This precluded any action by the Board of Public Education under the Loyalty Act,* . . . ." (Emphasis supplied.)

30. Purdon's Pa. Stats. Ann. Const. (Art. X, § 1).

are certain legitimate governmental objectives, and state action must depend for its validity upon its tendency to the accomplishment of one of those objectives. The means must be reasonably calculated to achieve the end sought and, granted alternative means, the method chosen must not be unnecessarily oppressive to the individual affected.[31] (Cf. *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U. S. 123, 162-3.) Analyzed in these terms, we submit that the state action in the case at bar offends the due process clause.

The governmental objective asserted as the justification for this inquiry is "the maintenance of a thorough and efficient system of public schools." That this is a legitimate governmental objective cannot be denied. The breadth of the inquiry permitted by such an objective, however, is equally undeniable; particularly as construed by the Court below to permit the questioning of a professional employee of the school system upon any matter "pertinent to his fitness". In this case, it obviously includes past lawful, political associations.

The question then becomes whether or not this purpose justifies the action of the Superintendent in this case. We submit that it does not for three reasons:

(1) The *area* of questioning in this case covered exclusively matters protected by the First Amendment.

(2) The very *breadth* of the inquiry makes it too great a threat to the liberty of the teacher.[32]

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31. *Buck v. Bell*, 274 U. S. 200; *Carolene Products v. U. S.*, 304 U. S. 144, Ftnote. 4; *Nebbia v. New York*, 291 U. S. 502; *Liggett Co. v. Baldridge*, 278 U. S. 105; *Weaver v. Palmer Bros. Co.*, 270 U. S. 402; *DeJonge v. Oregon*, 299 U. S. 353; *Hague v. CIO*, 307 U. S. 496; *Lovell v. City of Griffin*, 303 U. S. 444; *Schneider v. New Jersey*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296; *Thomas v. Collins*, 323 U. S. 516.

32. Cf. *Thornhill v. Alabama*, 310 U. S. 88; *Cantwell v. Connecticut*, 310 U. S. 296.

(3) Inquiry into past lawful, political associations of school teachers is not calculated to make the school system either thorough or efficient.

1. If teachers, as a class, are to be subject to compulsory disclosure of legal past political affiliations, the public school system will have available to its professional staff only the most orthodox minds, and, more unfortunately, only those by whom such inquisition is likely to be suffered rather than resisted. A staff of teachers submissive and complaisant to forced interrogation in this or related fields will hardly be counted upon to tolerate, let alone stimulate free trade in ideas in the classroom and thus the tendency of such inquiry is antithetical to the freedom of thought and expression essential to the educational process.

2. Vagueness aggravates the invasion and obfuscates the determination of pertinency and propriety. In *Sweezy v. New Hampshire, supra,* this Court was faced with the problem of the relationship between an investigation and its legislative authorization. The authorization was found to be so broad and the questions resisted so remote from its asserted purpose as to amount to an abdication by the legislature of the responsibility attendant on the inquiry. The vagueness of the enabling act made it impossible for the Court to determine whether the total interest of the state as related to the particular inquiry justified the invasion of liberty involved.

In the case at bar, the character and extent of the invasion is approximately the same. The asserted interest of the state is different. It seems that the state conceives that its school system cannot be thorough and efficient if its students are exposed to radical political ideas, even in the absence of either evidence or suggestion that petitioner or any other teacher ever taught any such thing. If this be the real interest of the state in this case, we

respectfully submit it justifies no inquiry whatever, because it is then a direct infringement on freedom of belief and expression without any necessity.

If, on the other hand, the real state interest in this case is self-protection, then the inquiry stands on no better footing than those considered in *Watkins, Sweezy, Morgan* and *Raley*, all *supra*. For here we have a seeking for corroboration of information already in the possession of the Superintendent from one, who at the time of his questioning, was not involved with any advocacy or teaching of the violent overthrow of the government, whose asserted associations were all perfectly lawful and in the remote past and as to whom the respondent board has conceded [33] it did not have sufficient information to institute proceedings, even under the all-embracing terms of the Pennsylvania Loyalty Act. Since the evidence and the concessions of record so far remove this petitioner from the battlefield of advocacy of violent overthrow, the inquiry into his associations and beliefs cannot be justified, except upon the forbidden theory of total, unrestricted warfare against unpopular ideas, neither alleged nor proved to have been taught in the classroom.

The invasion of liberty resulting from compulsory disclosure of past lawful, political associations is so great that it cannot be countenanced as an assertion of the state's power of self-protection or its power to maintain a thorough and efficient system of public schools and it does not matter whether the power be asserted pursuant to specific legislative authorization, vague legislative authorization or no legislative authorization.

Since thorough and efficient education demands the utmost freedom of inquiry, belief and association for teachers, and since inquiry into political associations and compulsory disclosure thereof tends to inhibit that freedom, such inquiry militates against, rather than in favor of the

33. Cf. Footnote 29 *supra*.

maintenance of a thorough and efficient system of public schools.

Hence, we submit, the dismissal for refusal to answer the Superintendent's question violates due process.

B. Dismissal of a School Teacher for Refusal to Answer Questions Relating to Past Political Associations Without Specific Pre-existing Legislative Authorization Is Fundamentally Unfair.

In *Konigsberg, supra,* the majority opinion suggests,

> "Serious questions of elemental fairness would be raised if the Committee had excluded Konigsberg simply because he failed to answer without first explicitly warning him that he could be barred for this reason alone, even though his moral character and loyalty were unimpeachable, and then giving him a chance to reply."[34]

The Court found it unnecessary to reach that question in Konigsberg's case because the Board of Law Examiners had based their exclusion on Konigsberg's failure to prove his good moral character and the Court therefore had only to find that his refusals to answer did not warrant the inference of bad moral character. The same might be said in this case. We have previously argued (Section I, *supra*) that petitioner's refusal to answer does not warrant the inference of incompetency either directly or through the intermediate steps of disloyalty, dishonesty, lack of civic responsibility and lack of cooperation.

In this case, however, that rationale may not be entirely satisfactory, for the label of incompetency is nothing more than a convenient stick chosen by the Board to beat its dog for refusing to answer its questions. We believe that the label of incompetency was employed, as stated by the Court of Common Pleas (R. 112), as "an expedient short-

34. 353 U. S. (Adv.) —, 77 S. Ct. 722 at p. 727.

cut". It is inescapable that petitioner was dismissed for failure to answer the Superintendent's question and that offense, whether it be called incompetency, bad moral character, suspected disloyalty, or murder, has been and remains the gravamen of the complaint. Therefore, we come to the question whether a state may dismiss a teacher solely for refusal to answer a question about past political association in the absence of any warning by virtue of pre-existing law or regulation.

It is clear from the *Garner* case, *supra*, that dismissal for refusal to disclose past association with subversive organizations during a period when such associations were specifically prohibited by law for public employees is valid, so long as the requirement of disclosure includes only organizations in which the employee was involved with knowledge of their subversive purpose.

It will be noted that in the case at bar, we have no applicable prohibition of such membership, nor have we any statute, ordinance, rule or regulation which provides for dismissal upon refusal to make such disclosure.

Petitioner's position is that dismissal under these circumstances is a dismissal for innocent conduct of whose consequences there was no prior warning and it is therefore fundamentally unfair. Mr. Justice Sutherland's famous statement in *Connally v. General Construction Co.*, 269 U. S. 385, provides our point of departure:

> ". . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

We believe the argument is much stronger in this case for four reasons:

(1) Here we have no law at all which condemns the conduct in question.

(2) The offending governmental agent expressly disavows the only law which purports to cover the subject matter.

(3) The conduct for which the penalty is imposed is acknowledged to have been innocent when it took place.

(4) The conduct involved is political association protected by the First Amendment.

The legal situation existing in Pennsylvania at the time of the questioning involved here was more than simply vague. A series of legislative actions seems to have combined to create a trap for petitioner and those similarly situated. Petitioner felt entitled to rely upon the prohibition of political tests for school teachers.[35] This reliance was enhanced by the repeal of the subversive provision of the Teachers' Tenure Act. Any apprehension which might have been created by the Loyalty Act was assuaged by his compliance with its present tense oath requirement and respondent's disavowal of its applicability.

Petitioner very quickly discovered that his reliance was misplaced. The trap concocted by the Board of Education is made up of those two greatest offenders against due process and fundamental fairness—retroactivity and vagueness. But worse, the trap was laid on the field of free speech.[36] This Court characterized Konigsberg's similar refusals as "not frivolous" (353 U. S. (Adv.) —, 77 S. Ct. 722 at 732, fn. 30 and cases there cited).

In *Garner*, the State of California officially recognized the dangers of Communist organizations and the legislature amended the Los Angeles City Charter to prohibit membership therein by City employees. Pennsylvania did no such thing. The Pennsylvania Legislature officially recognized

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35. Footnote 14, *supra*, p. 16.

36. Cf. *Thornhill v. Alabama*, 310 U. S. 88.

the danger and condemned the organizations in 1951. Now it attempts to punish its employees for not having recognized the evil sooner than the State did. This is unfair.

The Superintendent's Warning

The record shows (R. 22) that after petitioner told the Superintendent that counsel had advised him against answering the question asked or similar questions, the Superintendent said,

> "I indicated to Mr. Beilan that this was a very serious and very important matter and that failure to answer the questions might lead to his dismissal . . . ; it wasn't a question of idle curiosity on my part, but that it was a real question of fitness for him to be a teacher or to continue in the teaching work.
>
> I think that is the gist of what happened on that occasion."

The Board may assert that this admonition constitutes fair warning of the possible consequences of petitioner's reticence. We respectfully submit that, in the light of the record, it does not.

In the first place, the very language used by the Superintendent, that he "indicated" his threat to petitioner and that the threat was only that the refusal "might" lead to his dismissal is so attenuated a warning as to be no warning at all. And the Superintendent was uncertain whether he even said this much.

Added to this we have another important factor—the absence of any law, rule or regulation which might give credence to the Superintendent's assertion. Furthermore, petitioner justifiably relied upon the advice of counsel to the effect that the law prohibited this questioning. These factors so adulterate the alleged "warning" as to make it unmarketable. This warning certainly does not measure

up to the warnings given Konigsberg by the California State Bar Committee.[37]

These considerations, we submit, require the conclusion that a "brand new exclusionary rule"[38] was applied to petitioner without justification in any law of the state and without warning of the consequences of his action.

This dismissal is an unconstitutional discrimination.

The state of affairs, left by the Court below, permits the School Boards of the hundreds of school districts of Pennsylvania, not to mention other states, to choose for themselves whether they will pursue, as respects any given teacher, the provisions of the Loyalty Act, with all its procedural protections, or to shortcut that procedure by the use of the vague provision of "incompetency" in the Teachers' Tenure Act. To leave it to administrative authorities, in their unbridled discretion, to decide such a question allows an opportunity for discrimination and denial of equal protection of the laws too clear for cavil. That discrimination is apparent on the face of this record.[39]

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37. Cf. 353 U. S. (Adv.) at p. 252 et seq. (*Dissenting Opinion*) at p. 274.

38. *Konigsberg v. State Bar of California*, 353 U. S. (Adv.) at p. 261.

39. It is interesting to compare other decisions of the Court below on similar questions. A county judge (now Associate Justice of the Supreme Court of Pennsylvania) was held to lack this power of inquisition with respect to an attorney (*Schlesinger's Petition*, 367 Pa. 476, 81 A. 2d 316) and with respect to a grand juror (*Commonwealth ex rel. Roth v. Musmanno*, 364 Pa. 359, 72 A. 2d 263). Similarly, an attempt on the part of the Attorney General to question an assistant district attorney as to allegedly subversive associations was held by the Court below to be "contrary to the spirit of all our laws which so jealously guard the rights of the individual." (*Matson v. Jackson*, 368 Pa. 283, 290, 83 A. 2d 134). Cf. Musmanno, J. concurring with reservation, 386 Pa. at 97:

> "I believe that counsel for the defendant here were fully justified in advancing the *Roth* and *Schlesinger* decisions in support of their erroneous position that Beilan was not accorded due

The discrimination thus permitted in this case and the potentiality for discrimination allowed by the decision below is too potent a threat to the political liberties of those citizens of the United States who happen to be employees of the Commonwealth of Pennsylvania to be permitted by the Fourteenth Amendment.

III. Dismissal of a Public School Teacher Under a Stigma of Disloyalty, Without a Hearing on Loyalty, Violates the Due Process Clause of the Fourteenth Amendment.

A. This Is a Loyalty Case.

Throughout these proceedings, respondent has been pathetically anxious to convince the Court that this is not a loyalty case. Respondent's Brief in Opposition in this Court states at p. 2,

> "This teacher was not charged with disloyalty. He was not discharged because of disloyalty."

The Board in this respect seeks to run with the hare and stand with the hounds, to take advantage of all possible benefits from the loyalty aspect of the case,[40] while ignoring its burdens.

At petitioner's hearing before the Board, in colloquy between the president of the Board and its counsel, the

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process of law, because if Alice Roth, in her case, was not accorded due process of law, then Beilan was denied it also. If Schlesinger was entitled to a writ of prohibition against the presiding judge in his case, Beilan should have asked for an injunction against the Philadelphia Board of Public Education in this case."

40. Br. Opp. at p. 7, Fn. 1, quotes at length from this Court's decisions in *Adler* and *Garner*, *supra*, about the importance of loyalty as a quality of a teacher.

schizophrenic character of the Board's position was made eminently clear.[41]

Additional evidence of the Board's preoccupation with loyalty was the introduction in evidence and the verbatim reading at the hearing before the Board of the entire transcript of petitioner's testimony before the Congressional Committee (R. 24-36).

The Superintendent of Schools in his testimony acknowledged that all of his questions had to do with loyalty (R. 17, 18, 47). The opinion of the Superintendent of Public Instruction (R. 76-97) shows clearly that he was influenced largely by considerations of loyalty (R. 76-97). The Court of Common Pleas found as a fact that that was the Board's interest (R. 106) and Chief Justice Jones says in his dissenting opinion,

> "The learned Court below had not the slightest difficulty in seeing through the gossamer with which the Board obscures the real basis for its dismissal of Beilan. It presumes to say that its action was wholly unrelated to any question of Beilan's loyalty. The Court concluded, however, that 'the proceedings before the Board of Education were actually concerned solely with the question of (Beilan's) suspected disloyalty.'

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41. "Mr. Rhoads: . . .

Now, so far as I am concerned, sir, and so far as my presentation of testimony is concerned, I don't think whether this man is loyal or disloyal has anything to do with this case. And if your counsel's advice were being asked in the matter, I should say that any testimony directed toward present loyalty or disloyalty is completely out of the case.

* * *

"Mr. Saul: And are you saying to the Board now that in making our decision we are not to be influenced by any thoughts or any ideas that we have as to loyalty or disloyalty?

"Mr. Rhoads: I can't say what thoughts are going to influence you, Mr. President, or anybody. I am saying that these charges are not directed toward loyalty, and beyond that I couldn't go. I couldn't possibly answer your question." (R. 12, 13.)

With that conclusion, I thoroughly agree." 386 Pa. at p. 105, 125 A. 2d at 338.

The Court below, while it accepts the Board's rationalization of its action, nevertheless, betrays its own concern with the loyalty issue.[42]

And in this Court, the true character of the proceedings is again spelled out in the following enigmatic statement in the Board's Brief in Opposition at pp. 6 and 7:

> "The question of loyalty was injected into the case by petitioner himself, and only because the questions he refused to answer concerned his former subversive associations."

Examples could be multiplied but it is really pointless to argue whether this should be called a "loyalty" case or an "incompetency" case.

B. The Discharge Carries the Stigma of Disloyalty.

The indisputable fact is that the petitioner was discharged for his refusal to answer a question about his loyalty. Such a discharge, we submit, is a discharge which marks the employee with a badge of infamy (*Joint Anti-Fascist Refuge Committee v. McGrath*, 341 U. S. 123) and is a penalty within the meaning of the *Wieman* and

42. The Court asks rhetorically "Can it be seriously argued that where the superintendent of schools has trustworthy information indicating that a teacher . . . may entertain Communistic ideologies which could be transmitted to the youth in his care, that no inquiry can be made as to the fact and that the teacher is not required to respond?" (Ibid. p. 90). In the companion case of *Kaplan v. School District*, the true basis of the Court's decision is even less concealed. Cf. 388 Pa. (Adv.) 213, 224:

> "Could the Superintendent of Schools, with the responsibility he owes the school children and their parents, permit on his teaching staff a member of the Communist Party, or, what amounts to the same thing (where school children are in the picture) a person who refused to deny Communist Party activity with which he stood accused?"

Slochower cases, *supra*. (Cf. *Lovett v. United States*, 328 U. S. 303). Such a dismissal without a hearing on the loyalty question is a violation of due process of law.

This teacher was as much dismissed because of suspected disloyalty as was the petitioner in *Wieman v. Updegraff*, *supra*, in which this Court held that dismissal for refusal to take the oath amounted to a dismissal because of disloyalty or, at least under a stigma of disloyalty.[43]

C. The Wieman and Slochower Decisions Are Indistinguishable.

In an attempt to distinguish the *Wieman* and *Slochower* decisions, the respondent suggests that petitioner had a hearing, whereas those teachers did not. Respondent argues that petitioner had a full hearing on the charge of incompetency. Indeed, he did. But when the only issue in the hearing is whether a question was asked which he refused to answer, then the Board's description of petitioner's hearing is indeed apt; for in its Brief in Opposition at p. 4, respondent says that the Board "conducted a formal hearing. . . ." This is precisely what it was—a formality employed for the purpose of arriving at a foregone conclusion. As one Board member summed it up in comment-

43. The reality of the stigma is best shown in the following poignant comment in the Brief Amicus Curiae of the American Civil Liberties Union, Greater Phila. Br. in the Court below:

> "The reasoning behind this and similar rulings (sustaining respondent's objection to the question whether the Superintendent possessed any evidence reflecting on the loyalty of a teacher) was that loyalty was not an issue; this, while newspaper headlines screamed *School Board Suspends Teacher as Subversive* and *Hoyer Hands Charges to 26 Teachers Today in Drive on School Reds* and *School Union Head Fired in Red Quiz*, and while the Superintendent of Schools, the Board's only witness, was then accepting from the United Business Men's Association of Philadelphia its 48th Achievement Award for his *"courageous and forthright manner in handling subversives in our school system."* (Emphasis supplied.)

ing on an objection of petitioner's counsel to the question of a Board member,

> "They can yell, but it doesn't get them any place." (R. 65)

Respondent characterizes the gist of this Court's decision in *Slochower* as being that Slochower had no "opportunity to explain"; whereas petitioner did. This suggestion is unfair in view of the fact that, of the twenty-five companion cases, a number of the teachers did explain, both to the Superintendent and to the Board, and fully answered the questions about their associations. They were nevertheless discharged on the same ground as petitioner.

Under the charges as drawn, what "explanation" is open? Loyalty is ruled out; inferences of disloyalty are expressly disclaimed, and competency under the statutory rating system is conceded (R. 53, 54).

Petitioner did explain to the Superintendent his reason for not answering the question. He told the Superintendent he was doing so on advice of counsel and he also told the Superintendent, almost in the words of the statute[44] the legal basis for counsel's advice (R. 19, 20).

The only meaning left to respondent's so-called explanation is capitulation—to tell all about one's self and others, entirely to satisfy the curiosity of the Superintendent and the Board on any matter they deem pertinent to one's fitness to teach. Tenure, academic freedom, the rights to freedom of opinion and political association, have thus passed the vanishing point on the vehicle of "explanation". It is clear that explanation, even in the sense of concession, would not and did not fit the demands of the Board of Education. It is equally clear that no explanation of the reason for refusing to answer did, in this case or any other, prevent dismissal. The attempted distinction

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44. Cf. Footnote 14, *supra*, p. 16.

of *Wieman* and *Slochower* rests, therefore, on a factual fantasy.

It also rests upon a legal delusion, for if those decisions mean anything, they mean that the hearing, or the opportunity to explain must be upon the issue of loyalty if the dismissal is to carry with it the stigma of disloyalty. It would have done Slochower little good to have a hearing before the Board of Higher Education on a charge that he pleaded the Fifth Amendment, for the purpose of giving him an opportunity to explain why he did so. We do not believe that this Court intended so empty an adjudication in that case. Petitioner is entitled to the substance of due process, not merely its shadow.[45]

D. Petitioner Was Deprived of Substantial Rights Granted by the Loyalty Act.

Had petitioner really been given a hearing under the Pennsylvania Loyalty Act, which the Board so fastidiously avoided, he would have been entitled, in the first instance, to have no investigation begun except upon written complaint (Pennsylvania Loyalty Act, § 6, 65 Purdon's Pa. Stat. Ann. (Supp.) § 210). In addition, he would have been confidentially notified of the charge (§ 6) and the entire proceedings would have been private, unless and until he was discharged (§ 6). He would have had the right to a hearing on the issue of his loyalty (loyalty at the time of the hearing, not in the distant past). He would have had an opportunity to reply to charges specifically drafted (§ 7). He would have had the right to require the Board to prove its case by legally competent evidence (§ 11). He would have had the right to compulsory process (§ 11), to cross-examination and all of the rules of evidence and procedure prevailing in the courts (§ 11). Furthermore, he could require that the proof of subversion appear by a fair preponderance of the evidence (§ 7). In addition, he would

45. *Cole v. Arkansas*, 333 U. S. 196.

have been accorded judicial review, including a hearing de novo in the Court of Common Pleas (§ 12) with the right of appeal to the Supreme Court of Pennsylvania. The difference between this and the procedure adopted by the Board need not be labored.

Since the dismissal carried a real taint of disloyalty and since petitioner was accorded no opportunity to be heard as to his loyalty, the dismissal denied him due process of law.

CONCLUSION.

For the foregoing reasons, petitioner respectfully submits that the judgment of the Supreme Court of Pennsylvania should be reversed and petitioner reinstated in his position.

Respectfully submitted,

JOHN ROGERS CARROLL,
A. HARRY LEVITAN,
Attorneys for Petitioner.

August 20, 1957.

APPENDIX A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fourteenth Amendment—Due Process Clause.

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * * U. S. C. Const. Amdt. 14.

Acts of Assembly to Be Strictly Pursued.

In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect. 1806, March 21, P. L. 558, 4 Sm. L. 326, § 13. 46 Purdon's Pa. Stats. Ann. § 156.

Causes for Termination of Contract.

The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employe shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employe: Provided, That boards of school directors may terminate the service of any professional employe who has attained to the age of sixty-two.

Nothing within the foregoing enumeration of causes, shall be interpreted to conflict with the retirement of pro-

fessional employes upon proper evidence of disability, or the election by professional employes to retire during the period of voluntary retirement, or the authority of the board of school directors to require professional employes to retire during said period of voluntary retirement, or the compulsion on the part of professional employes to retire at the attainment of age seventy. 1949, March 10, P. L. 30, art. XI, § 1122; 1949, May 9, P. L. 939, § 4. 24 Purdon's Pa. Stats. Ann. § 11-1122.

Rating System.

In determining whether a professional employe shall be dismissed for incompetency, the professional employe shall be rated by an approved rating system which shall give due consideration to personality, preparation, technique, and pupil reaction, in accordance with standards and regulations for such scoring as defined by rating cards to be prepared by the Department of Public Instruction, and to be revised, from time to time, by the Department of Public Instruction with the cooperation and advice of a committee appointed by the Superintendent of Public Instruction, including representation from county and district superintendents of schools, classroom teachers, school directors, school supervisors, and such other groups or interests as the Superintendent of Public Instruction may deem appropriate. 1949, March 10, P. L. 30, art. XI, § 1123. 24 Purdon's Pa. Stats. Ann. § 11-1123.

Ineligibility for Employment or Appointment to Office.

No subversive person, as defined in this act, nor any person as to whom on all the evidence there is reasonable doubt concerning his loyalty to the government of the United States or the Commonwealth of Pennsylvania, shall be eligible for employment in or appointment to any office or any position of trust or profit in the government of

or in the administration of the business of this Commonwealth, or of any school district, county, municipality or other political subdivision of this Commonwealth. 1951, Dec. 22, P. L. 1726, § 3. 65 Purdon's Pa. Stats. Ann. § 213.

Present Employes; Oath; Discharge.

The appointment authority of each person, including teachers and other employes of the public school system who, on the first day of March, one thousand nine hundred fifty-two, shall be in the employ of the Commonwealth of Pennsylvania or of any of its political subdivisions, other than those holding State or local elective offices of any kind; shall require such person to, and every such person shall, on or before the first day of April, one thousand nine hundred fifty-two, make a written statement, under oath or affirmation, which statement shall contain notice that it is subject to the penalties of perjury, and shall be in the following form:

"I, ..., do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth, and that I will discharge the duties of ..... with fidelity.

"And I do further swear (or affirm) that I do not advocate, nor am I knowingly a member of any organization that advocates, the overthrow of the government of the United States or of this Commonwealth by force or violence or other unconstitutional means, or seeking by force or violence to deny other persons their rights under the Constitution of the United States or of this Commonwealth.

"And I do further swear (or affirm) that I will not so advocate nor will I knowingly become a member of such organization during the period that I am an

employe of the Commonwealth of Pennsylvania (or political subdivision thereof)."

Any persons failing or refusing to execute either statement required hereby shall be discharged immediately by the proper appointing authority." 1951, Dec. 22, P. L. 1726, § 5. 65 Purdon's Pa. Stats. Ann. § 215.

Investigations.

Any appointing authority may at any time, upon written complaint, investigate any person, including teachers and other employes of the public school system, appointed or employed by him, to determine whether he is a subversive person. If, upon any investigation, it appears that such person is a subversive person, the person shall immediately be privately and confidentially notified of the recommendation by the appointing authority. No public announcement, release, statement or comment concerning the investigation, recommendation or notification shall be made by the appointing authority in any way whatsoever, unless and until the person so notified is discharged under section seven of this act. 1951, Dec. 22, P. L. 1726, § 6. 65 Purdon's Pa. Stats. Ann. § 216.

Hearing Before Appointing Authority.

Any person, including teachers and other employes of the public school system, who has been so notified under this act, shall have a right to a hearing before the proper appointing authority within thirty (30) days after receiving said notification. If no hearing is requested within thirty (30) days after said notification is received, the person shall immediately be discharged by the appointing authority. He may appear before such appointing authority personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf through witnesses. The person who has been so

notified shall at the same time be further informed in writing of such hearing, at least ten days before the day set for the hearing, and shall be informed therein of the nature of the charges against him; and the person who has been so notified shall be informed in the notice (1) of his right to reply to such charges in writing within ten days after the date of service, (2) of his right to a hearing on such charges before the appointing authority, which hearing may be private and confidential or may be public, at the option of the person so notified, and (3) of his right to appear before such appointing authority personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his own behalf through witnesses. If, after due hearing, it is determined by the appointing authority by a fair preponderance of the evidence that the person who has been so notified is a subversive person, as defined in this act, the person who has been so notified shall be discharged; otherwise, the recommendation shall be ignored. Said determination shall be made within sixty (60) days after the hearing. If the appointing authority shall be comprised of three or more members, a vote of two-thirds of the members shall be necessary in order to discharge a person. 1951, Dec. 22, P. L. 1726, § 7. 65 Purdon's Pa. Stats. Ann. § 217.

Appeals to the Superintendent of Public Instruction.

After a final determination of discharge under this act by an appointing authority, any teacher or other person employed in the public school system of the Commonwealth who believes himself aggrieved by such determination may appeal on the record from the determination by an application in writing to the Superintendent of Public Instruction of the Commonwealth within twenty days after receiving written notice of such determination. The superintendent shall set a time and place for the hearing of the appeal, which hearing shall be not more than thirty (30)

days after receipt thereof, and give due notice of said hearing to the appellant and to the appointing authority whose determination is under review. The hearing shall be held by the superintendent or by a person or persons, not exceeding three, designated by the superintendent in writing to hear the appeal in his behalf. The superintendent, in his discretion, may designate such person or persons to hear such appeal and to report to him. The persons so designated by the superintendent may be officers or employes of the civil service of the Commonwealth. The person or persons holding the hearing may make such inquiry as may be deemed advisable. Within sixty (60) days after the hearing on appeal, the superintendent shall affirm or reverse the findings and determination under review, and, in the case of reversal, shall order the reinstatement of the appellant, who shall be entitled to back pay from the date of his discharge. 1951, Dec. 22, P. L. 1726, § 10. 65 Purdon's Pa. Stats. Ann. § 220.

Effect and Applicability of Act.

(a) The provisions of this act shall not affect the right to discharge any person for any cause other than those provided for by this act or without cause under existing law. No procedure provided by any existing tenure or civil service law shall be applicable in any proceeding under this act. 1951, Dec. 22, P. L. 1726 § 15(a). 65 Purdon's Pa. Stats. Ann. § 225(a).

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IN THE

Supreme Court of the United States

October Term, 1956.

No. [redacted] 63

BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA,

Respondent,

v.

HERMAN BEILAN,

Petitioner.

On Petition for Certiorari to the Supreme Court of Pennsylvania.

Brief for Respondent in Opposition.

C. Brewster Rhoads,
1421 Chestnut Street,
Philadelphia 2, Pa.,
Attorney for Respondent.

Of Counsel:
Edward B. Soken,
Sidney L. Wickenhaver.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 668.

BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA,

Respondent,

v.

HERMAN BEILAN,

Petitioner.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinions in the Supreme Court of Pennsylvania are appended to the Petition for Writ of Certiorari.

JURISDICTION.

Petitioner has invoked the jurisdiction of this Court under Title 28 U. S. C., Section 1257(3). Respondent submits that no question under the Constitution or laws of the United States is raised by the dismissal of a public school teacher on the statutory ground of "incompetency" under the teachers tenure laws of Pennsylvania, after proper notice of charges are filed therein, where the charge of incompetency was based upon the teacher's refusal to answer proper questions of his Superintendent in a professional interview. The decision of the Pennsylvania Supreme Court was based on adequate non-federal grounds. There is no federal question for this Court.

QUESTION PRESENTED.

Whether this Court should review a state Supreme Court's decision that a school teacher's refusal to answer questions asked by his Superintendent as to his alleged past membership in subversive organizations, constituted incompetency within the meaning of a state statute and therefore justified his dismissal after notice and hearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitutional and statutory provisions are set out in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE.

This is a proceeding under the tenure provisions of the Public School Code of the Commonwealth of Pennsylvania, Act of March 10, 1949, P. L. 30, § 1122 et seq., as amended, 24 Purdon's Pa. Stat. Ann. §§ 11-1122 et seq., dismissing a public school teacher.

The Board of Public Education of the School District of Philadelphia dismissed the petitioner, after a hearing held on due notice of charges, on the ground of incompetency. The Superintendent of Public Instruction of the Commonwealth affirmed the decision of the Board. The petitioner appealed to the Court of Common Pleas of Philadelphia County, which reversed the order and set aside the discharge of the teacher. On appeal by the Board to the Supreme Court of Pennsylvania, the order of the lower court was reversed and the order of the State Superintendent of Public Instruction dismissing the petitioner was reinstated.

This teacher was not charged with disloyalty. He was not dismissed because of disloyalty. He was dismissed because, in an interview with his Superintendent, he refused to answer questions which directly concerned his professional fitness.

The Board of Public Education also sustained an additional reason for dismissal. This concerned the petitioner's refusal to answer questions concerning his alleged Communist affiliations during the period 1943 to 1948, in his appearance before a Congressional Committee. This second ground for dismissal is not before this Court on this Petition for Certiorari, as the Supreme Court of Pennsylvania sustained the dismissal on the basis of the petitioner's refusal to answer the questions of the Superintendent of Schools in the professional interview, and found it unnecessary to consider whether the other charge was also sustained (Opinion, Petitioner's Appendix A, p. 11a).

At the written request of the Superintendent of Schools, petitioner reported to the Superintendent's office for an interview on June 25, 1952. At this conference the Superintendent stated that he had received information which, if true, reflected adversely on petitioner and that he wished to discuss this information to determine whether it was true (R. 19a). Petitioner suggested that the Superintendent ask the questions. The Superintendent said that he wanted the answer to each question before asking the next one. He then asked whether petitioner was Press Director of the Professional Section of the Communist Political Association in 1944. Petitioner requested that he be permitted to consult counsel and the Superintendent agreed to this request.

A second conference took place in the Superintendent's office on October 14, 1952, at the Superintendent's written request. Petitioner stated that he had consulted counsel and that he would not answer either the question about his Communist activities in 1944 or any questions of a similar character (R. 22a).

The Superintendent explained that this was a very serious and important matter and that failure to answer might lead to dismissal (R. 22a). Petitioner persisted in his refusal to answer questions.

The Board of Public Education conducted a formal hearing on the charges of incompetency, as required by § 1127 of the Pennsylvania Public School Code of 1949, P. L. 30 (24 Purdon's Pa. Stat. Ann. §§ 11-1127).

Petitioner was present and represented by counsel, who participated actively in the hearing. He was afforded opportunity to offer evidence, but did not do so. Petitioner did not testify on his own behalf at the hearing before the Board.

The Board of Public Education found that the charges of incompetency were sustained and petitioner was dismissed by a 14 to 1 vote of the Board (R. 75a). On petitioner's appeal to the Superintendent of Public Instruction of the Commonwealth, the State Superintendent sustained the action of the Philadelphia Board of Public Education (R. 76a-80a).

The petitioner then appealed to the Court of Common Pleas, where his appeal was heard on the record before the Board, and no further testimony was offered by the petitioner, although under the School Code he had the right to present additional evidence if he so desired. That court reversed the order of the Superintendent of Public Instruction and set aside the dismissal (R. 104a-112a).

On appeal of the Board to the Supreme Court of Pennsylvania, the order of the lower court was reversed and the order of dismissal was sustained. The Supreme Court denied the petition for reargument (Opinion and Order, Petition for Certiorari, Appendix A, 1a-32a).

ARGUMENT.

I. The Decision of the Supreme Court of Pennsylvania Is Based on an Interpretation of the State Law.

The Supreme Court of Pennsylvania based its decision on the findings of fact of the Board and the application of state law to those facts. It is not the function of this Court to review such issues.

The Court held that the Board of Public Education acted properly in dismissing the petitioner for "incompetency" under § 1122 of the Public School Code. In arriving at its interpretation the Court relied on its own previous opinions that incompetency as a cause for dismissal was to be given a broad meaning, that the term was not technical, that in common and approved usage it meant "disqualification; inability; incapacity; lack of ability, legal qualification, or fitness to discharge the required duty", or "want of physical, intellectual, or moral ability; insufficiency; inadequacy; specif., want of legal qualifications or fitness", or "general lack of capacity of fitness or lack of the special qualifications required for a particular purpose". *Horosko v. Mt. Pleasant Township School District, et al.*, 335 Pa. 369, 6 A. 2d 866.

The Court concluded in the present case that "Certainly a teacher who refuses to respond to a pertinent inquiry relative to his fitness to teach is not competent within the broad reach of that term, whether the inquiry concerns loyalty or any other proper subject of inquiry. Frankness and cooperation with an administrative superior bear directly upon a teacher's competency. They are as essential in one occupying a post of public trust and civic responsibility as academic qualifications". (Petition for Certiorari, Appendix A, p. 7a.)

The Supreme Court of Pennsylvania was determining only the proper interpretation of "incompetency" as a ground for dismissal in a state statute.

The Court also held that the discharge of this petitioner for "incompetency" was proper under the Public School Code, and that it was not necessary that the proceeding for dismissal be brought under the Pennsylvania Loyalty Act of December 22, 1951, P. L. 1726, 65 Purdon's Pa. Stat. Ann. §§ 211-225. The Court of Common Pleas had reversed the order of dismissal, not on any constitutional ground, but on the ground that the Loyalty Act of the State had so dealt with the matter of loyalty that the proceedings to dismiss this teacher on the ground of incompetency under the Public School Code were precluded.

The Supreme Court, in reversing the decision of the Court of Common Pleas, held that the record clearly showed that the ground for dismissal was not disloyalty, that the proceedings before the Board of Education were not concerned with the question of any suspected disloyalty, and that the proceedings under the general tenure provisions were clearly proper.

In so holding, the Pennsylvania Supreme Court was simply interpreting the laws of the State of Pennsylvania in holding that the Loyalty Act did not preclude dismissal of a teacher on the ground of incompetency for refusal to answer a pertinent question concerning his past affiliations. The Supreme Court properly distinguished between a proceeding for dismissal on charges of disloyalty, or subversion, and a proceeding under the Tenure Act for dismissal for incompetency because of the teacher's refusal to perform his professional obligation of responding to relevant questions of his Superintendent concerning past associations which bore upon his fitness to teach.

The Supreme Court of Pennsylvania was concerned with the reconciliation of two Acts of the State Legislature. No federal constitutional question is involved in that determination, and it is not a proper matter for review by this Court.

The question of loyalty was injected into the case by petitioner himself, and only because the questions he re-

fused to answer concerned his former subversive associations. Furthermore, this Court has already held that former subversive associations of a teacher are a matter of pertinent inquiry by his public employer.[1] That question is therefore settled.

If an inquiry into past conduct is relevant to present fitness, it does not matter whether the conduct in question related to lawful or unlawful activity.

The Board of Public Education did not base its finding of incompetency on any assumption or inference that the petitioner was disloyal, because he had refused to answer the questions relating to alleged former subversive activities. On the contrary, as the Supreme Court of Pennsylvania held, the finding of incompetency was based on the teacher's refusal to cooperate frankly with his Superintendent in an inquiry which the Superintendent had the power and duty to make.

---

1. "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate." *Adler et al. v. Board of Education of the City of New York*, 342 U. S. 485, 493 (1952).

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment." *Garner et al. v. Board of Public Works of Los Angeles, et al.*, 341 U. S. 716, 720 (1951).

The contention that petitioner was dismissed because the Board suspected that he was disloyal was considered and rejected by the Supreme Court of Pennsylvania, which held there was no basis in the record for imputing to the Board any such conclusion.

In holding that the Superintendent had the right and duty to make such a relevant inquiry, and that the teacher had the corresponding duty to respond to it, the Supreme Court of Pennsylvania has acted upon and decided only a question of state law.

II. The Decision of the Supreme Court of Pennsylvania Is Not in Conflict With the Decisions of This Court.

In its argument in support of the Petition, the petitioner argues, rather inconsistently, both that the issue is one which this Court has not decided and that the Pennsylvania decision is not in accord with those of this Court.

Petitioner's reliance on the decisions in *Slochower v. Board of Higher Education of New York City*, 350 U. S. 551, and *Wieman v. Updegraff*, 344 U. S. 183, is misplaced. Indeed those decision demonstrate the lack of merit in petitioner's case.

In the *Slochower* case, this Court reversed the dismissal of a professor employed in a public college in New York City, on the ground that he was dismissed summarily under an ordinance which gave him *no right to a hearing* preliminary to his discharge. In the *present* case, the petitioner was accorded a full hearing on the charge of "incompetency", as provided by the Public School Code.

The Supreme Court of Pennsylvania in the present case has adequately distinguished the *Slochower* decision on the basis of the statement in the opinion of this Court at 350 U. S. 558:

> "'it is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at "the property, affairs

or government of the city, or * * * official conduct of city employees". In this respect the present case differs materially from Garner, where the city was attempting to elicit information necessary to determine the qualifications of its employes * * *'" 386 Pa. 92, at pp. 93, 94 (Petitioner's Appendix, 10a-11a).

This Court also stated in the *Slochower* case that no inference of guilt could be properly drawn from a person's exercise of his constitutional right to refuse to testify under the Fifth Amendment. The Fifth Amendment was not involved in petitioner's professional interview with his Superintendent of Schools, and it is not raised in the Petition for Certiorari. Furthermore, no infefence of guilt was drawn from the failure to answer questions, since petitioner was not dismissed on the ground of disloyalty or suspicion of disloyalty.

In *Wieman v. Updegraf, supra*, this Court held that a state law requiring a loyalty oath was invalid because it required the employee to state that he was not affiliated, directly or indirectly, with any organization which had been determined to be subversive. The defect of the Oklahoma law was that the employee was required to swear to this statement, regardless of whether he knew of the subversive nature of the organization. This Court held that such membership might have been innocent, and, in such case, mere innocent membership could have resulted in dismissal.

In the *Wieman* case this Court was not concerned at all with the requirement of disclosure which had been before it as to the affidavit requirement in the *Garner* case. The Court did *not* hold in the *Wieman* case that an employee could *not* be required to disclose even an innocent membership. It held only that an employee *could not be dismissed* because of membership in some organization which he might have joined innocently without knowledge of its subversive purposes.

The *Wieman* case was a loyalty case. The Pennsylvania Supreme Court has held that the present case is not

a loyalty proceeding, that it does not involve charges of subversion, and that it does not involve the question of whether innocent membership in a Communist organization would be cause for dismissal.

The *Wieman* case does not disable a public employer from requiring its employees to disclose their past associations on a proper inquiry into their fitness to hold responsible public positions.

The accusation which is made again in the Petition for Certiorari, as it was before the Supreme Court of Pennsylvania, that the charge of incompetency was a sham, and that petitioner was really dismissed because he was suspected of disloyalty, has already been answered. It was considered directly and answered specifically by the Supreme Court of Pennsylvania. The Court analyzed carefully the procedure employed by the Board of Public Education. It rejected the implication of any lack of good faith on the part of the Board of Education. The language of the Supreme Court of Pennsylvania leaves no doubt that it rejected this charge that the School Board employed a "sham" in order to rid itself of an undesirable teacher. The reckless language appearing on page 14 of the Petition for Certiorari is answered with dignity by the Supreme Court of Pennsylvania, which says in its majority opinion (p. 4a):

> "* * * we find absolutely no support for the second conclusion reached by the court below.[2] It not only impugns the good faith of the members of the Board but completely brushes aside the record which consistently from beginning to end irrefutably demonstrates that appellee was not dismissed for subversion or disloyalty but for refusal to answer pertinent questions bearing directly upon his fitness as a teacher and, therefore, his competency."

"2. In its opinion the court states: 'The school authorities obviously desired to dismiss appellant because they suspected him of disloyalty.' and 'The Tenure Act was utilized as an expedient short-cut.'"

This constant, studied and reiterated attempt, despite the uniquivocal record to the contrary, to create an impression that this public school teacher was dismissed because of disloyalty instead of incompetency, has been held by the Supreme Court of Pennsylvania to be completely unfounded.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Petition for Certiorari should be denied.

Respectfully submitted,

C. Brewster Rhoads,
Attorney for Respondent.

Of Counsel:

Edward B. Soken,
Sidney L. Wickenhaver.

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IN THE

Supreme Court of the United States

October Term, 1957.

No. 63.

BOARD OF PUBLIC EDUCATION,
SCHOOL DISTRICT OF PHILADELPHIA

v.

HERMAN A. BEILAN,

Petitioner.

Brief for Respondent.

C. Brewster Rhoads,
Sidney L. Wickenhaver,
Montgomery, McCracken, Walker & Rhoads,
1421 Chestnut Street,
Philadelphia 2, Pennsylvania,
Edward B. Soken,
21st Street and The Parkway,
Philadelphia 3, Pennsylvania,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States.

October Term, 1957.

No. 63.

BOARD OF PUBLIC EDUCATION,
SCHOOL DISTRICT OF PHILADELPHIA

v.

HERMAN A. BEILAN,

Petitioner.

BRIEF FOR RESPONDENT.

JURISDICTION.

Petitioner has invoked the jurisdiction of this Court under Title 28 U. S. C., Section 1257(3). Respondent submits that no question under the Constitution or laws of the United States is raised by the dismissal of a public school teacher on the statutory ground of "incompetency" under the teachers' tenure laws of Pennsylvania, where the charge of incompetency was based upon the teacher's refusal to answer proper questions of his Superintendent in a professional interview. The decision of the Pennsylvania Supreme Court was based on adequate non-federal grounds. There is no substantial federal question for this Court.

QUESTION PRESENTED.

Does it violate the due process provision of the Fourteenth Amendment for a State to dismiss a public school teacher on the ground that his refusal to answer questions asked by his Superintendent as to his past activity in subversive organizations constituted incompetency within the meaning of a State statute?

STATEMENT OF THE CASE.

This is a proceeding dismissing a public school teacher under the tenure provisions of the Public School Code of the Commonwealth of Pennsylvania, Act of March 10, 1949, P. L. 30, § 1122 et seq., as amended, 24 Purdon's Pa. Stat. Ann. §§ 11-1122 et seq.

The ground for dismissal, as sustained by the Supreme Court of Pennsylvania, was incompetency, consisting of the refusal of petitioner to answer questions of the Superintendent of Schools in a professional interview, relating to whether petitioner had been a member of subversive organizations. This charge was sustained by the Board of Public Education after due notice and after a hearing which was attended by petitioner and his counsel.

There was an additional charge against petitioner based on a refusal to answer questions concerning his alleged Communist affiliations before a Congressional Committee, and this charge was also sustained by the Board of Public Education. This charge is *not* before the Court on this *certiorari*, as the Supreme Court of Pennsylvania sustained petitioner's dismissal on the basis of his refusal to answer the Superintendent's question, and found it unnecessary to consider whether the other charge was also sustained (R. 124).

At the written request of the Superintendent of Schools, petitioner reported to the Superintendent's office

for an interview on June 25, 1952. At this conference the Superintendent stated that he had received information which, if true, reflected adversely on petitioner, and that he wished to discuss this information to determine whether it was true (R. 19a). Petitioner suggested that the Superintendent ask the questions. The Superintendent said that there were a number of questions and that he wanted the answer to each question before asking the next one. He then asked whether petitioner was Press Director of the Professional Section of the Communist Political Association in 1944. Petitioner requested that he be permitted to consult counsel and the Superintendent agreed to this request.

A second conference took place in the Superintendent's office on October 14, 1952, at the Superintendent's written request. Petitioner stated that he had consulted counsel and that he would not answer either the question about his Communist activities in 1944 or any questions of a similar character (R. 22a).

The Superintendent explained that this was a very serious and important matter and that failure to answer might lead to dismissal (R. 22a). Petitioner persisted in his refusal to answer questions.

The Board of Public Education conducted a formal hearing on the charges of incompetency, as required by Section 1127 of the Pennsylvania Public School Code of 1949, P. L. 30 (24 Purdon's Pa. Stat. Ann. § 11-1127).

Petitioner was present and was represented by counsel, who participated actively in the hearing, which was private at the request of petitioner. He was afforded opportunity to offer evidence. Petitioner did not testify on his own behalf at the hearing before the Board.

The Board of Public Education found that the charges of incompetency were sustained and petitioner was dismissed by a 14-to-1 vote of the Board (R. 75a). On petitioner's appeal to the Superintendent of Public Instruction of the Commonwealth, the State Superintendent sustained

the action of the Philadelphia Board of Public Education (R. 76a-80a).

The petitioner then appealed to the Court of Common Pleas, where his appeal was heard on the record before the Board, and no further testimony was offered by the petitioner, although under the School Code he had the right to present additional evidence if he so desired. That Court reversed the order of the Superintendent of Public Instruction and set aside the dismissal (R. 104a-112a).

On appeal the Supreme Court of Pennsylvania reversed the order of the lower court and sustained the dismissal (R. 115-127). The Supreme Court denied the petition for reargument (R. 145).

This Court granted certiorari, 353 U. S. (Adv.) 964 (1957).

SUMMARY OF ARGUMENT.

The State has the power to dismiss a public school teacher who refuses to answer pertinent questions of the School Superintendent, relating to the teacher's former affiliation and activity in Communist causes.

Such an inquiry into former Communist activity of a teacher is clearly within the authority, and indeed the duty, of the School Superintendent, as it is relevant to the teacher's present fitness to teach. The position of a public school teacher is a sensitive one. An employee's past conduct and associations are relevant to a determination of his present fitness for such a position of trust.

Garner v. Board of Public Works of Los Angeles, 341 U. S. 716 (1951).

Dismissal on the ground of incompetency, a specified cause for dismissal under the State statute, as interpreted by the State Supreme Court, does not violate the federal Constitution. Under the State law, as interpreted by prior decisions, incompetency is a broad term, not limited to classroom proficiency and learning, and includes the lack of qualifications and fitness. The Supreme Court of Pennsylvania held in this case that a teacher who refuses to respond to a pertinent inquiry relating to his fitness to teach is not competent, whether the inquiry concerns loyalty or any other proper subject of inquiry. Such an interpretation of the statute by the State Supreme Court is purely a question of State law. It is not an arbitrary interpretation and does not infringe any constitutional right of the teacher.

The dismissal of the teacher for incompetency in refusing to respond to such a proper inquiry is not a dismissal for past or present disloyalty, either actual or suspected. The petitioner was dismissed for incompetency as the record clearly shows. The State Supreme Court properly determined that the procedure employed

dismissal of the petitioner was correctly based on the tenure provisions of the Public School Code. The Pennsylvania Loyalty Act was not involved. Such determination was an interpretation of the State law, and does not infringe any provision of the federal Constitution.

No inference of disloyalty of the petitioner was drawn by the Board of Public Education. The purpose of the Superintendent's inquiry into past activity of the teacher was to help to determine the teacher's present fitness. Accordingly the question of whether such past activities of the teacher were lawful or unlawful or whether they would have disqualified him for continued employment; if they had been determined to exist, is irrelevant.

The petitioner had adequate notice that an answer to the question was required of him. Not only must he be presumed to know his duty to his superior to co-operate in a proper inquiry, but also he was expressly notified that his refusal to answer might lead to dismissal, and he persisted in his refusal.

The petitioner was accorded a full hearing before the Board of Public Education, on written charges in accordance with the provisions of the Pennsylvania Public School Code. He had adequate notice. He attended the hearing with his counsel, with full opportunity for cross-examination and presentation of evidence. He had the right of appeal and has availed himself of it. Petitioner has been accorded due process of law in every step of these proceedings.

It is submitted that the power of a State to determine the qualifications of public school teachers under its own tenure laws requires that the exercise of this power in dismissing the petitioner should be upheld. Such action infringes no constitutional right of the individual.

ARGUMENT.

I.

The State Has the Constitutional Right to Dismiss a Public School Teacher Who Refuses to Disclose His Past Communist Affiliations.

The Supreme Court of Pennsylvania held that the conduct of petitioner constituted incompetency within the meaning of the Public School Code of Pennsylvania, Act of 1949, P. L. 30 § 1122, 24 Purdon's Pa. Stat. Ann. § 11-1122, when he refused to answer any question of the Superintendent of Schools relating to past Communist affiliations.

It is conceded by petitioner that present Communist affiliations on the part of a public school teacher are proper grounds for his dismissal. The existence of such influences in the schools is a matter of vital concern. There is, therefore, a right and a duty on the part of school officials to make pertinent inquiry as to whether such affiliations do exist. *This does not mean that the refusal of the petitioner to answer questions would have justified his dismissal for subversion. It means only that it was a subject of legitimate inquiry* as to whether petitioner had such affiliations in the past, and if he had, what effect, if any, they had on his present fitness.

The petitioner contends that the inquiry of the Superintendent was unauthorized, because it related to activities prior to the date when the teacher was required by state law to take a loyalty oath. The only significance of the fact that the specific question which petitioner refused to answer related to a past activity is that an affirmative answer to such question would not have constituted ground for dismissal any more than a negative answer would have. We have not contended that a teacher could be dismissed who had once been a Communist, but had sincerely

ceased to be so affiliated and had taken the required loyalty oath in good faith.[1]

The result of an affirmative answer to the questions about past subversive affiliations would have been that further questions would have been asked, as to whether such activity had ceased, and if so, when and under what conditions. This is simply the normal course of proper inquiry. Because of the importance to the educational system of assuring that teachers are loyal and fit to teach, and because of the possibility that subversive affiliations once established may continue, the Superintendent had the duty to inquire whether the subversive association had existed.

It was held in *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951), that the public employer has the right to require the employee to disclose past Communist membership. It was so held even though such past membership was not in itself a ground for dismissal.

In the *Garner* case the Los Angeles city ordinance required every city employee (1) to take a loyalty oath and (2) to execute an affidavit stating whether or not he was ever a member of the Communist Party or the Communist Political Association, and if he ever was such a member, the dates when he became, and the periods during which he was, such a member.

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1. Petitioner overstates the proposition, however, when he contends that Communist activity and membership in 1944 was purely a lawful political association. Depending upon a teacher's knowledge of the purposes of his membership, they may not have been. As long ago as 1941, the Superior Court of Pennsylvania took judicial notice of the conspiratorial and disloyal character of the Communist Party and held that Communist membership was ground for dismissal of a civil service employee even before the enactment of a specific statute providing that advocacy of subversive doctrines was ground for dismissal under the civil service law, because the power to dismiss Communists from public service existed prior to the explicit statute and need not rest on express legislative grant. *Powell v. Unemployment Compensation Board of Review*, 146 Pa. Super. 147, 22 A. 2d 43 (1941).

The employees in the *Garner* case had been dismissed for refusal to take the oath and, in two instances, for refusal to make the affidavit only. The Court considered the oath and the affidavit separately, and upheld the validity of each requirement. As to the affidavit requirement, the Court, speaking through Mr. Justice Clark, said (341 U. S. 720):

> "1. The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge.
>
> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. *Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust.* Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid." (Emphasis supplied.)

The Brief for Petitioner repeatedly misconstrues the *Garner* decision in stating that it was limited to a requirement of disclosure of only such unlawful associations as were specifically proscribed by legislation at the time the employee was a member and known by him to be subversive.[2] Petitioner confuses the loyalty oath requirement with the affidavit requirement of the Los Angeles ordinance, both of which were before the Court in the *Garner* case. This Court determined that the two provisions of the ordi-

2. Brief for Petitioner, pp. 7, 22-23, 31, 32.

nance merited separate consideration and upheld both on distinct grounds. The ordinance required an affidavit from each employee stating whether or not he had ever been a member of the Communist Party or the Communist Political Association, and the dates of any such association, regardless of when it had occurred and regardless of any knowledge by the employee of the subversive purposes of the organization at the time of any such membership. The ordinance did not provide for the dismissal of an employee who made the disclosure, but it did require the disclosure.

In *Adler v. Board of Education of the City of New York*, 342 U. S. 485 (1952) this Court again stated the right of the State or municipality to inquire into past associations of an employee. Dealing specifically with this power as it affected a public school teacher, and referring to the decision in the *Garner* case, the Court, speaking through Mr. Justice Minton, said, 342 U. S. 493:

> "We adhere to that case. A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state had a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. *One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty.* From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of offcials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the *fitness* and loyalty of such persons, from considering the organizations and persons with whom they associate." (Emphasis supplied.)

The decision in the *Garner* case was undisturbed by the decisions in *Wieman v. Updegraff*, 344 U. S. 183 (1952) and *Slochower v. Board of Higher Education of New York*, 350 U. S. 551 (1956). In both of these cases this Court was careful to distinguish the decision in the *Garner* case as one upholding the right of the city to inquire of its employees as to matters relevant to their fitness and suitability for the public service.[3]

We submit that this Court's decision in the *Garner* case upholds the right of a public employer to require its employee on pain of dismissal, to answer just such a question or questions as the petitioner refused to answer in the present case.[4]

The *Garner* decision is not impaired by the recent decision of this Court in *Konigsberg v. State Bar of California, et al.*, 353 U. S. (Adv.) 252, 1 L. ed. 2d 810 (1957).

The opinion of the Court in the *Konigsberg* case makes no reference to the *Garner* case. In the *Konigsberg* case, the majority of this Court held that a State could not exclude an applicant from the practice of law by *inferring* that he had failed to prove that he had a good moral character, and did not advocate violent overthrow of the government, under the circumstances there present. The record showed that Konigsberg had unequivocally testified that

3. *Wieman v. Updegraff*, 344 U. S. 183, 188-189; *Slochower v. Board of Higher Education of New York*, 350 U. S. 551, 556.

4. The Superintendent asked only one question of the petitioner in the present case and the petitioner refused to answer this question or questions similar to it (R. 22a). It was, however, a significant and specific question, as to whether in 1944 the petitioner was Press Director of the Professional Section of the Communist Political Association (R. 19a). It was obviously an inquiry directed to a specific time in the past, so that, if the petitioner had answered it in the affirmative, the Superintendent might have made further inquiries as to when, and the circumstances under which, such affiliation had terminated. The testimony makes it clear that similar questions were contemplated as to any further activity after 1944 and would have been asked if the petitioner had not definitely stated that he would not answer "questions of this type." (R. 22a, 44a-45a)

he did not advocate violent overthrow of the government and that he had introduced impressive evidence of his good character by testimony of character witnesses. The Bar Committee nevertheless had inferred that he had not proved his good moral character, based on (1) testimony of a single witness that he had once attended meetings of the Communist Party in 1941 (2) evidence that he had written newspaper articles critical of public officials and their policies, and (3) refusal to answer certain questions as to membership in the Communist Party.

The State Bar Committee had lumped all of these things together in inferring that Konigsberg had not proved good moral character. The majority of this Court held that such an inference could not be drawn. In so holding, the majority opinion specifically stated that the question whether a State could exclude an applicant merely for failing to answer questions was not raised by the record and that the majority did not mean to intimate any view on that problem.[5]

In the present case we are not dealing with an applicant for admission to the Bar, but with a public employee, specifically, a public school teacher, who occupies a sensitive position by reason of association with children in a system of compulsory public education. We are *not* concerned with any *inference of disloyalty* of the teacher, either from his failure to answer the question or from any other evidence. We are *not* concerned with the question of whether the petitioner was or was not a Communist in 1944 or whether he remained one. We are *not* at all concerned with drawing *inferences* from the refusal to answer the Superintendent. We *are* here directly concerned with the question of whether the petitioner can be properly dismissed from his position of public trust, because of his refusal to answer proper questions. The refusal to answer itself has been held to constitute incompetency as a matter of interpretation of a state statute.

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5. 353 U. S. (Adv.) 252, 261-262, 1 L. ed. 2d 819.

Accordingly it is submitted that the *Konigsberg* case is inapplicable.

The petitioner's obligation to answer the questions of the Superintendent were based on his relationship to his superior. It was a duty arising out of his employment in the public school system. Under the State law it was the Superintendent's right and duty to make the inquiry, and the duty of the petitioner to respond. The State law, so interpreted, does not violate the Fourteenth Amendment.

II.

The Conclusion of the Pennsylvania Supreme Court that Refusal to Answer a Proper Question of the Superintendent Constitutes Incompetency Is a Proper Interpretation of a State Statute.

The Supreme Court of Pennsylvania sustained the dismissal of the petitioner for "incompetency," a statutory ground for dismissal under the tenure provisions of the Public School Code of 1949, P. L. 30, § 1122, 24 Purdon's Pa. Stat. Ann. § 11-1122. The Court held that the petitioner's refusal to answer the Superintendent constituted incompetency and that the Board of Public Education was justified in so concluding when it sustained the charges.

Since the Federal Constitution permits the State to require, as a condition of public employment, that a teacher answer such questions relevant to his fitness, the State's determination that his refusal constituted incompetency within the meaning of the State statute presents no federal constitutional question. It is simply a determination that the existing State law imposes this duty on the teacher to respond and renders him subject to dismissal for failure to perform this duty.

The interpretation of the State statute by the State Supreme Court is conclusive. *Barsky v. Board of Regents*, 347 U. S. 442, 448 (1954).

In so holding, the Court acted in accordance with its own precedents as to the meaning of "incompetency," as used in Section 1122 of the Public School Code of 1949. It is not a word of art, but a word with a broad meaning in common and approved usage. The Pennsylvania Supreme Court so held in *Horosko v. Mt. Pleasant Township School District*, 335 Pa. 369, 374-375, 6 A. 2d 866, 868-870 (1939); cert. den. 308 U. S. 553. "Incompetency," as interpreted by the Pennsylvania courts, properly includes any conduct which evidences a lack of fitness or suitability for employment.

The refusal to answer the proper questions of one's administrative superior, directed toward matters relevant to the teacher's qualifications, is a manifestation of lack of fitness for his employment. This is so, not because any inference of misconduct is drawn from the refusal to answer, but because the manifested unwillingness to answer a proper question is the disqualifying fact. We submit that no employer, private or public, is or should be required to retain employees who defy their superiors in the exercise of proper authority and refuse to cooperate in an inquiry which is vital to the ends which their employment is intended to serve.[6]

The petitioner contends that the law is the only measure of his duties. This assumes that a teacher can retain his position as long as he does not commit a crime. It is submitted that this position must be rejected. The State can and does set a standard for teachers that requires more than refraining from crime.

The failure of a teacher to measure up to the standard set by the State is properly held to constitute incompetency. In any event the determination that such conduct constituted incompetency is purely a matter of state law, provided that the Constitution does not forbid the State to require such a standard.

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6. The statement of policy of the Association of American Universities holds, with reference to disclosure of Communist affiliations, that a faculty member owes *complete candor* to his university.

III.

Petitioner's Dismissal for Incompetency Under the Pennsylvania Statute Did Not Deny Him Due Process of Law.

As already noted, the Supreme Court of Pennsylvania has determined that legislative authorization for the dismissal of petitioner existed, as a proper interpretation of the Pennsylvania statute. As it is also demonstrable that the State has the power to dismiss on this ground, the Court's determination that there is statutory authority for the dismissal does not raise any federal constitutional question. It is contended, however, in the Brief for Petitioner that it was "fundamentally unfair" to dismiss him, where there was not a specific statute that expressly declared that the failure of a teacher to respond to such questions should be ground for dismissal.

We suggest that this question is not fairly comprised within petitioner's statement of the "Question Presented" in his Petition for Certiorari [7], and, therefore, is not before the Court under Rule 40(1)(d). It is submitted that in any event, the contention is without merit.

Petitioner cannot complain that he was not warned of the possible consequences of his refusal to answer. The record shows clearly that such warning was given to him by the Superintendent and that he had adequate opportunity to answer the question after the warning was given. The Superintendent of Schools testified (R. 22):

> "I indicated to Mr. Beilan on that occasion that this was a very serious and a very important matter

7. The Petition for Certiorari states the "Question Presented" as follows:

> "Is it a violation of the Due Process Clause of the Fourteenth Amendment for a state to dismiss a public school teacher as 'incompetent' simply because of his refusal in 1953 to answer a question asked by the Superintendent of Schools about his membership in the Communist Political Association in 1944, where such association was lawful at the time it was alleged to exist, and where no hearing on the question of the teacher's loyalty is accorded him."

> and that failure to answer the questions might lead to his dismissal. I wanted to make that clear to Mr. Beilan so that there would be no doubt in his mind as to the importance of this matter as I conceived it; that it wasn't a question of idle curiosity on my part, but that it was a real question of fitness for him to be a teacher or to continue in the teaching work."

It is difficult to see how any warning could be more explicit than this. The fact that the Superintendent told him that his refusal "might" lead to dismissal was certainly as far as the Superintendent could go in giving a warning, since the authority to dismiss resides with the Board of Public Education after a hearing, and the Superintendent has no power of dismissal.

In *Konigsberg v. State Bar of California*, 353 U. S. (Adv.) 252 (1957), this Court expressly refrained from ruling on the question of whether an applicant for admission to the Bar could be excluded on the ground of refusal to answer a question of the Bar Committee. Petitioner cites, however, the following dictum in the majority opinion (353 U. S. 261):

> "Serious questions of elemental fairness would be raised if the Committee had excluded Konigsberg simply because he failed to answer without first explicitly warning him that he could be barred for this reason alone, even though his moral character and loyalty were unimpeachable, and then giving him a chance to reply."

The answer to petitioner's contention is that this dictum is clearly inapplicable to the present case, because the Superintendent did explicitly warn petitioner that failure to answer the questions might lead to his dismissal.

Apart from the fact that petitioner was expressly warned that refusal to answer might lead to dismissal, we submit that it is clearly within the province of a State

Supreme Court to determine that such refusal constitutes incompetency. This Court's decision in *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951), declares the right of a public employer to ask such questions and to require the employee to answer. The Supreme Court of Pennsylvania has determined in this case that in Pennsylvania the authority to ask such questions is properly vested in the Superintendent of Schools and that accordingly a teacher is required to answer the Superintendent.

When petitioner contends that express legislative authorization was lacking for such an inquiry by the Superintendent and for dismissal of petitioner for refusal to answer, he is not making a constitutional argument, but is attempting to re-argue the issues of state law which have been decided. For it is the Supreme Court of the State that determines whether there is lawful authorization for the Superintendent's inquiry and whether the dismissal comes within statutory grounds. It is also the Supreme Court of the State that determines the sufficiency of the authorization.

The Supreme Court of Pennsylvania said in the present case (R. 120-121):

> "Certainly a teacher who refuses to respond to a pertinent inquiry relative to his fitness to teach is not competent within the broad reach of that term, whether the inquiry concerns loyalty or any other proper subject of inquiry. Frankness and cooperation with an administrative superior bear directly upon a teacher's competency. They are as essential in one occupying a post of public trust and civic responsibility as academic qualifications. Can it be seriously argued that where the superintendent of schools has trustworthy information indicating that a teacher has an incurable communicable disease or that he is a peddler of narcotics or, as here, that he may entertain Communistic ideologies which could be transmitted to the youth in his care, that no inquiry can be made as to the fact and

that the teacher is not required to respond. As well stated in the brief of counsel for the appellant: "' . . . The State Constitution requires the General Assembly to maintain a thorough and efficient system of public schools. The School Code is the legislative implementation of this Constitutional duty. The rights and duties of a Superintendent have grown with custom and with professional usage. Many of his duties are imposed on him by tradition. It is one of his duties under the School Code to make sure that the teaching staff is competent, and therefore to weed out professionally unfit teachers. This is a continuing process that the Superintendent carries on. The Superintendent has the power and the duty, whenever the facts indicate the need, to inquire into and reevaluate the fitness of a teacher.'. Unquestionably there is a reciprocal duty on the part of the teacher to fully and frankly cooperate. He may not block such proper inquiry by secretiveness or concealment."

The illustrative analogy employed so effectively by the Supreme Court of Pennsylvania, of a situation where the Superintendent has information that a teacher may be engaged in peddling of narcotics, is an apt one. Despite its labored effort to reject the analogy, even the Brief for Petitioner admits that a teacher has a duty to co-operate by answering questions concerning dispensing narcotics to school children, "because it may fairly be said that protection of school children is a part of the job of a school teacher."

This is the precise reason why the Supreme Court of Pennsylvania determined that the teacher has a similar duty to respond to the Superintendent's inquiry about a former Communist association. A more explicit statute is not required in this case, as it would not be needed to require the teacher's co-operation in a narcotics investigation.

The fact that a past association may have been innocent and lawful is not a material distinction. A past asso-

ciation with narcotics peddlers might have an equally innocent explanation. The point is that the State law properly requires an answer and does not permit the teacher to thwart the inquiry by refusing to give one.

Nor is it a material distinction that narcotics peddling may be even more heinous than Communism. It has been held that school children are entitled to be protected from subversive influence. Accordingly, inquiry directed to determine whether it exists, by inquiring first whether such association previously existed, is a proper, lawful inquiry.

There is nothing ex post facto or retroactive in such a decision by the highest Court of a State. This is the ordinary process of judicial interpretation. It is the function of the State Supreme Court to interpret statutes, and when it does so, it declares the existing law as applying to the conduct of the parties at the time it occurred.

In 1937 the statute was first enacted in Pennsylvania, specifying the grounds on which a teacher may be dismissed: "immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, persistent and wilful violation of the school laws." From that date the Supreme Court and the other courts of Pennsylvania have frequently been called upon to interpret the general language of the statute, for application of "incompetency" and the other terms to various types of conduct on appeals from dismissals.

For example, the conduct of a woman teacher in working in her husband's beer garden, taking a drink of beer, shaking dice with customers and showing them how to play a pinball machine, although not illegal, was held to constitute "incompetency" in a teacher, even though it deprived her of some of the freedom of action enjoyed by persons in other vocations.[8]

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8. *Horosko v. School District of Mt. Pleasant Township*, 335 Pa. 369, 6 A. 2d 866 (1939), cert. den. 308 U. S. 553. See also: *Appeal of School District of City of Bethlehem*, 347 Pa. 418, 32 A. 2d 565 (1943), cert. den. 320 U. S. 782.

To reach such conclusions, the Court was simply exercising its function of judicially defining the word "incompetency" and applying it to the facts before it.

A civil service statute in Pennsylvania made "conduct unbecoming an officer" a ground for discharging a policeman. The Supreme Court of Pennsylvania held that the refusal of a police captain to answer questions before a grand jury and to explain the source of certain moneys he had received was properly considered by the civil service commission to be "conduct unbecoming an officer." Dismissal on this general ground was upheld.[9]

We submit that it is plain common sense that a teacher knows, when he is required to attend a professional interview with his superior, that his wilful refusal to respond to proper questioning may lead to his dismissal. Certainly, the teacher knows that his superior expects a reply. Certainly he must also be presumed to know that he has an obligation to answer any proper questions. He should know that he is required to co-operate in a matter of legitimate concern in the administration of the schools and the selection and screening of teaching personnel. He should also know that questions relating to a possible subversive affilation on his part are matters of legitimate concern.

If he voluntarily takes the position that he will not answer such questions, he has manifested his unfitness to be a teacher. The Supreme Court of Pennsylvania has so decided in this case.

The tenure provisions of the Pennsylvania Public School Code, like other statutes, both federal and state, which specify the grounds on which employees may be discharged, do so in general terms. They do not attempt to delineate all of the different types of conduct which may come within the grounds set forth. Such laws have not been held to raise any constitutional question of due process of law because they are in general terms. Since the Supreme Court of Pennsylvania determined that petitioner's con-

9. *Souder v. City of Philadelphia*, 305 Pa. 1, 156 Atl. 245 (1931).

duct in blocking the inquiry at its outset constituted incompetency, petitioner's dismissal was properly sustained.

It would be neither practicable nor wise to require that a statute specify all of the types of conduct which would support a determination of incompetency.

The fact that a state statute is expresed in general terms is not usually regarded as raising a question under the Fourteenth Amendment. The state may properly allow wide latitude to administrative discretion in the application of its statutes.[10]

The particularity required in a criminal statute is not required in other enactments.[11]

The petitioner received a full hearing on the charge of incompetency, with written notice of charges, representation by counsel, with opportunity for cross-examination, presentation of evidence, the privilege of demanding a hearing de novo before the Court of Common Pleas, argument and appeal. The case is therefore entirely different from that of *Slochower v. Board of Higher Education of New York*, 350 U. S. 551, (1956), in which a teacher was summarily dismissed without hearing for refusal to testify before a legislative committee.

It is submitted that the proceeding by which the petitioner was dismissed complied with every requirement of fairness and due process of law.

IV.

The Conclusion of the Supreme Court of Pennsylvania that the Proceeding Under the Public School Code Was Not Forbidden by the Loyalty Act Was a Correct Determination of a Question of State Law.

The Supreme Court of Pennsylvania held that the record in this case clearly shows that the ground for dismissal of petitioner was not disloyalty, that the proceedings before

10. See *Dreyer v. Illinois*, 187 U. S. 71, 83-84 (1902); *Pacific Tel. & Tel. Co. v. Seattle*, 291 U. S. 300, 303-304 (1934).

11. See *Mahler, et al. v. Eby*, 264 U. S. 32, 41 (1924).

the Board of Education were not concerned with the question of any suspected disloyalty, and that the tenure provisions of the Public School Code were applicable. In so holding the Supreme Court was simply interpreting the laws of the State of Pennsylvania in holding that the Loyalty Act did not bar dismissal of a teacher on the ground of incompetency for refusal to answer a pertinent question concerning his past affiliations.

There was no federal constitutional question involved in this determination. The conclusion of the Supreme Court of Pennsylvania was based on its interpretation of "incompetency" as a ground for dismissal under the tenure law. The Court said (R. 119):[12]

> ". . . The Loyalty Act pre-empted the field of dismissal for subversion as therein defined, but other causes of dismissal remained unaffected. Section 15 of the Loyalty Act expressly provides: 'The provisions of this act shall not affect the right to discharge any person for any cause other than those provided for by this act or without cause under existing law . . .' Moreover the Loyalty Act provides neither the procedure nor the substantive law with respect to the duty of a teacher to answer proper questions. The provisions of the School Code do provide the basis for dismissal of a teacher who refuses to answer such questions."

Petitioner argues, however, that he was denied a constitutional right because he was not given a hearing on the issue of loyalty. This was the only question which petitioner presented as the basis for his Petition for Certiorari. As a matter of fact, he was not charged with disloyalty.

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12. The dissenting opinion of Mr. Chief Justice Jones was based on his disagreement with the interpretation of the state statutes and on his opinion that the teacher was really dismissed for disloyalty, and was not based on constitutional grounds (R. 128-137).

The accusation that the petitioner continually makes, both in his Petition for Certiorari and his Brief on the merits, that he was really dismissed because of disloyalty and that the charge of incompetency was merely a convenient expedient to get rid of a suspected subversive, has been considered directly and answered specifically by the Supreme Court of Pennsylvania. That Court rejected the implication of any such lack of good faith on the part of the Board of Education, and concluded that the record "irrefutably demonstrates" that the petitioner "was not dismissed for subversion or for disloyalty but for refusal to answer pertinent questions bearing directly on his fitness as a teacher" (R. 118).

As the Court pointed out, this issue was expressly defined and limited at the outset of the hearing before the Board of Education both by counsel for the Board and by counsel for petitioner who agreed that the issue was not disloyalty (R. 11a-13a, 50a).[13]

In his brief on the merits, petitioner contends that he was dismissed under a "stigma of disloyalty". The Board made no finding carrying any such stigma of disloyalty.

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13. "Counsel for the School Board stated: 'I am not asking this Board in this proceeding or any other proceeding that I know of to pass upon the loyalty or disloyalty of this particular teacher. I am saying that the things which this teacher did in connection with his professional obligations were such as to result in incompetency sufficient to discharge the teacher under the School Code.', and counsel for Mr. Beilan stated: 'Mr. President, if you please, I have no intention of seeing this proceeding become a loyalty hearing. Mr. Rhoads [counsel for the School Board] has stated that it is not. I agree with him completely . . .'. Later in the hearing, counsel for Mr. Beilan also stated: 'We have no intention of making a loyalty proceeding of this hearing. We agree with Mr. Rhoads and Mr. Weinrott [a member of the Board] who stated that the only issue is whether this particular man refused to answer certain particular questions and whether, as a matter of law, that amounts to a ground for dismissal . . .'."

V.

Inaccurate Statements in the Brief for Petitioner.

The Brief for Petitioner contains numerous inaccuracies with respect to the facts of the case, both in its Statement of the Case and its Argument.

A. On page 5, the Brief states that at the hearing counsel for the Board conceded that petitioner's competency as a teacher was not in question (R. 53). On the contrary, the Record shows that counsel never made any concession of "competency". What counsel did state was that petitioner was rated satisfactory insofar as his *classroom performance* was concerned. Competency embraces more than classroom teaching.

B. The same paragraph of petitioner's Brief also states that counsel acknowledged, with respect to the charge of persistent and wilful violation of the school laws, that he "knew of no school law which petitioner could be considered to have violated" (R. 9a). The Record shows that counsel's statement was that he could not point to any specific section of the Public School Code which was violated, but that there was wilful and persistent violation of the School Code in general. We developed this point further in our briefs in the state courts, by showing that the Superintendent had numerous powers and duties implied from a construction of the Public School Code as a whole, and one of these duties was to ascertain the professional fitness of the teaching staff. This imposed a corresponding duty on the teacher to help the Superintendent in his inquiry. Failure on the part of the teacher to do so is wilful and persistent violation of the school laws. We referred to Pennsylvania cases holding that disobedience of orders and regulations constitute wilful violation of the school laws,[14]

14. *Ambridge Borough School District v. Snyder*, 346 Pa. 103, 108, 29 A. 2d 34 (1942); *Ganaposki's* case, 332 Pa. 550, 2 A. 2d 742 (1938).

and supporting the conclusion that it was not necessary for the charges to specify a particular section of the Code.[15]

The Supreme Court of Pennsylvania, holding that the petitioner was incompetent, found it unnecessary to pass on the question of whether petitioner's conduct also constituted persistent and wilful violation of the school laws. Accordingly, the question is not part of this case on the present certiorari. Nevertheless, the petitioner's implication that the Board and its counsel acknowledged that they had no basis for such a charge is so completely misleading that this correct statement is submitted.

C. In footnote number 4 on page 6 of Brief for Petitioner, the petitioner misconstrues the holding of the Supreme Court of Pennsylvania in what is referred to as a "companion case" of *Kaplan v. Philadelphia School District*, 338 Pa. 213, 226; 130 A. 2d 672 (1957), as sustaining both the ground of incompetency and wilful violation of the school laws as basis for suspension without pay. The Brief further refers to the *Kaplan* case in footnote number 42 on page 37, by quoting a part of the Court's opinion in that case out of its context. The *Kaplan* case was a suit for salary during the period of the teacher's suspension from duty until he was dismissed by the Board. The issue of the validity of plaintiff's dismissal was not before the Court. It was assumed by both parties for the purpose of such case that he was properly dismissed.

D. Throughout his Brief the petitioner reiterated that the Board of Public Education really dismissed him because it suspected him of disloyalty. This contention is completely unsupported in the Record *and was rejected by the Pennsylvania Supreme Court.* We have already dealt with this point in a previous section of our Brief.[16]

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15. *Batrus' Appeal*, 148 Pa. Super. 587, 26 A. 2d 121 (1942).
16. *Supra*, p. 23.

E. The statement on page 15 of the Brief that the Board is attempting to sustain a dismissal on an "afterthought" in the charges against petitioner is completely without foundation. The Record shows that the refusal to answer the Superintendent was a major charge against the petitioner from the outset of these proceedings.

F. The statement on page 19 that the interview with the Superintendent resembled "a scene in a police interrogation room" rather than any investigation known to the law is completely without warrant. The Record shows clearly that the interview was conducted on a professional basis with complete fairness to the petitioner.

G. The inference which the petitioner draws from the fact that thirteen months elapsed between the interview with the Superintendent and the bringing of charges against the petitioner (Brief for Petitioner, page 20) is unfounded. The Pennsylvania Supreme Court took notice of the fact that no charges were preferred against petitioner or other teachers until the Superintendent had completed individual interviews with a substantial number of teachers (R. 116-117). The interval merely emphasizes the deliberation that occurred before charges were made. There is no basis for the statement that the Superintendent did not "really" consider the petitioner to be incompetent because of his refusal to answer the questions.

Likewise, the fact that the Superintendent did not notify petitioner's immediate school principal and that petitioner continued to receive ratings of "satisfactory" after the interview is of no significance. His ratings, of course, were made by the immediate principal of the school in which he served. The principal knew nothing of the interviews with the Superintendent. The interviews were conducted in privacy to avoid any unfavorable publicity to the teacher. This was done in an effort to be fair to petitioner until a

policy was determined, and it cannot be made the basis of the inference which the petitioner attempts to draw.

H. Another false premise which permeates the Brief for Petitioner is that this case involves academic freedom and freedom of lawful political association. These questions are in no way involved. The Superintendent's right to make the inquiry is clear under the prior decisions of this Court.[17]

It does not infringe petitioner's academic freedom or freedom of lawful political association to ask him whether he was Press Director of the Professional Section of the Communist Political Association in 1944.

I. The statement on page 39 of the Brief for Petitioner that other teachers who fully answered questions about their association were discharged on the same ground as petitioner is not only irrelevant to this case because it is not part of the Record, but also is false in fact. A number of teachers who were interviewed by the Superintendent and answered his questions were not charged with anything.

J. In the concluding section of the Brief for Petitioner, it is contended that he was deprived of substantial procedural rights under the Loyalty Act. The implication that he was denied such rights in the proceeding under the Public School Code is without basis. In fact the petitioner did receive written charges and notice of hearing, the hearing was private at his request, the evidence introduced was legally competent and petitioner had every opportunity to defend himself, to offer evidence and to cross-examine. He availed himself of these rights. He was accorded judicial review. He had the right of a hearing de novo in the Court of Common Pleas, of which he did not avail himself. He did appeal to the Supreme Court of Pennsylvania.

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17. *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951); *Adler v. Board of Education of the City of New York*, 342 U. S. 485 (1952).

CONCLUSION.

For the reasons stated, it is submitted that the judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

C. Brewster Rhoads,
Sidney L. Wickenhaver,
Montgomery, McCracken, Walker & Rhoads,
1421 Chestnut Street,
Philadelphia 2, Pennsylvania,

Edward B. Soken,
21st Street and The Parkway,
Philadelphia 3, Pennsylvania,
Attorneys for Respondent.

Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1957.

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BOARD OF PUBLIC EDUCATION,
SCHOOL DISTRICT OF PHILADELPHIA

v.

HERMAN BEILAN,

Petitioner.

No. 165.

MAX LERNER,

Petitioner,

v.

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN, HENRY K. NORTON and DOUGLAS M. MOFFAT, Constituting the New York City Transit Authority.

PETITION FOR REHEARING.

JOHN ROGERS CARROLL,
2015 Land Title Bldg.,
Philadelphia 10, Pa.,
Counsel for Petitioner in No. 63.

LEONARD B. BOUDIN,
25 Broad Street,
New York, N. Y.
Counsel for Petitioner in No. 165.

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HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN, HENRY K. NORTON AND DOUGLAS M. MOFFAT, CONSTITUTING THE NEW YORK CITY TRANSIT AUTHORITY.

PETITION FOR REHEARING.

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that this Court grant rehearing of its decisions of June 30, 1958, affirming the judgments below.

REASONS FOR GRANTING REHEARING.

In the petition for certiorari in No. 63 and the jurisdictional statement in No. 165, petitioners requested this Court to grant hearings in these cases for the purpose of clarifying the import of certain of its previous decisions regarding the rights of public employees with respect to association and belief. With deference, we submit that the majority opinions in these cases have failed to achieve that clarification and further have introduced additional confusion on these important matters.

The previous decisions in *Garner v. Los Angeles Board of Public Works*, 341 U. S. 716, and *Gerende v. Board of Supervisors*, 341 U. S. 56, in contrast with the principles announced in *Wieman v. Updegraff*, 344 U. S. 183, *Slochower v. Board of Higher Education*, 350 U. S. 551, rehearing denied, 351 U. S. 944, and *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, had at least established that the lawful associations of public employees could not be made the basis for their dismissal without certain prerequisites if due process was to be served. The concept of "scienter" introduced in these cases at least gave protection to presumptively innocent association. In addition, clearly-drawn pre-existing legislation making disclosure a condition of employment added certain guaranties of fairness in the dismissal procedures.

While the instant cases were pending in this Court, five other decisions appeared to lend support to petitioners' view of the teaching of the prior decisions. They were *Konigsberg v. State Bar of California*, 353 U. S. 252, *Schware v. Board of Bar Examiners*, 353 U. S. 232, *In re Patterson*, 353 U. S. 952, *Morgan v. Ohio*, 354 U. S. 929, and *Raley v. Ohio*, 354 U. S. 929. In those cases, particularly *Konigsberg*, this Court declared it improper to draw an inference of lack of good moral character from one's colorable assertion of a constitutional right against ques-

tioning about his associations and beliefs. In addition, the *Patterson* and *Schware* decisions seem to indicate that even had there been affirmative answers to questions regarding Communist Party association, the evidence thereby disclosed would not have justified refusal of state licensing. These decisions cannot be squared with the majority and concurring opinions in *Lerner and Beilan.*

Beilan and *Lerner* have introduced an entirely new concept into the relationship between states and their employees—an obligation of frankness whose application to these cases entirely overrides previous requirements with respect to *scienter* and pre-existing disclosure statutes. This overriding obligation has been permitted to short-circuit previously established rules regarding fair warning and knowing association. Furthermore, the *Konigsberg* prohibition of improper inferences has, as though by magic, been replaced by the Court's approval of the doctrine of "equating" failure to answer with incompetency or unreliability. The consequence of these decisions is that although California may not "infer", New York and Pennsylvania may "equate". Although California's impermissible inferences did not overcome Konigsberg's attempt to prove his good moral character, nevertheless Pennsylvania's and New York's equation satisfies those states' burden of proving Beilan's and Lerner's incompetency and unreliability.

The purported distinction of *Konigsberg* is particularly perplexing. The Court says that that case "stressed the fact that the action of the State was not based on the mere refusal to answer relevant questions—rather, it was based on the inference impermissibly drawn from the refusal." This is entirely true, but the *Konigsberg* case dealt with whether the testimony of an ex-Communist about his attendance at meetings, his criticism of certain public officials and his refusal to answer questions, taken altogether, would suffice so to undermine *Konigsberg's* showing of good moral character as to disqualify him for admission to the Bar. It

seems to be hardly an appropriate distinction to say that whereas all three such things were insufficient in *Konigsberg*, one merely is enough in the present cases, not simply to cast doubt upon good moral character, but affirmatively to sustain the employer's burden of proving bad character. If this is a distinction of *Konigsberg*, we can only suggest it has swallowed the rule.

The nub of the majority opinions in both *Lerner* and *Beilan* is that refusal to answer "relevant" questions amounts to unreliability and incompetency. This reasoning is squarely contradictory to the rulings in *Wieman* and *Konigsberg*. In all four cases, the assertedly relevant questions involved lawful past associations. In *Wieman* a statute required the disclosure; that may be inferentially true of *Konigsberg*. There is no such statute involved in *Beilan* or *Lerner*.

One further consequence of these holdings opens up new dangers for public employees and their associations, that is, that in each case the Court permits state authorities deliberately to ignore other clearly applicable existing state procedures which guarantee at least fundamental fairness to the state employees. These existing statutes both in Pennsylvania and New York are now for practical purposes a dead letter. It appears to us that all of the things that have now been condemned in previous decisions are permitted in these cases simply in the name of candor and frankness.

Even *Garner* did not go this far. For in *Garner* there was a pre-existing law making the disclosure a condition of employment. In *Garner*, as interpreted by this Court and subsequently by California, the questioning was required to relate to knowing subversive association. The instant cases extend the *Garner* principle of conditioned employment beyond the necessities of any legitimate state interest and represent a far greater invasion of at least presumptively lawful association of state employees beyond the tolerance of the First and Fourteenth Amendments.

If the present decisions be regarded as a logical consequence of the *Garner* doctrine, then we suggest that that case itself needs reconsideration. In *Garner*, this Court upheld "inquiry as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are no less relevant in public employment." 341 U. S. 720.

This principle ought to be reconsidered because, we submit in all deference, it is logically unsound, unsupported by any principal of law and has had most deletrious effects upon the civil service and upon the rights of political association and privacy. It is our belief that the qualifications of public employees ought to be determined upon strictly relevant tests of their ability to perform and the actual performance of their work. See *Scholl v. Bell*, 125 Ky. 750, 102 S. W. 248; *Souder v. City of Philadelphia*, 305 Pa. 1, 156 Atl. 245; *Canteline v. McClellan*, 282 N. Y. 166. Even if inquiries beyond those matters may be treated as relevant, nevertheless such relevance must yield to the rights of privacy, of political association and of expression (*Sweezy v. New Hampshire*, 254 U. S. 234).

In addition to the confusion created on the issues of pre-existing statutes, fair procedures and scienter, as well as the erosion of previously established principles of free association and privacy, there is one further area of confusion created by the instant decisions. *Wieman* and *Joint Anti-Fascist Refugee Committee* had seemed to us to have established that discharge for refusal to answer a question relating to Communist association created a stigma of disloyalty and hence that due process required a hearing on the issue of loyalty prior to dismissal. The Court now holds that the state can avoid such requirements of due process by discharging a man for the same reasons but calling it

incompetency, unreliability or lack of candor. We doubt that the Court upon further reflection would agree with the proposition upon which these cases now stand, namely, that the use of a label can permit the State to dispense with what otherwise would be regarded as the requirements of due process.

We urge reconsideration of a doctrine whose effects are already being felt in different areas. The Coast Guard has already received judicial approval for the avoidance of the due process requirements of *Lester v. Parker*, 235 F. 2d 789 (9 Cir. 1956) by the imposition of a loyalty questionnaire upon persons seeking employment in the privately owned merchant marine (*Graham v. Richmond*, CADC No. — (Holtzoff, J., pending on appeal). The Florida Supreme Court has indicated that it is considering whether this Court's decisions herein may not justify the disbarment of a lawyer who refused to answer similar questions in the course of disciplinary proceedings (*Sheiner v. Florida*, — Fla. —). The United States Army, notwithstanding this Court's decisions in *Abramowitz v. Brucker* and *Harmon v. Brucker*, 355 U. S. 579, is employing the same questionnaire technique today.

Certainly before this Court's decisions become so fixed that they will mold judicial and administrative behavior throughout the United States with such adverse effects upon the rights of privacy and association, a full reevaluation of the legal philosophy underlying the doctrine, and its consequences, is justified in the public interest.

JOHN ROGERS CARROLL,
Counsel for Petitioner in No. 63.

LEONARD B. BOUDIN,
Counsel for Petitioner in No. 165.

August 12, 1958.

I, John Rogers Carroll, do hereby certify that I am counsel for the respondent in No. 63 and that this petition for rehearing is presented in good faith and not for delay.

JOHN ROGERS CARROLL

August 12, 1958.

I, Leonard B. Boudin, do hereby certify that I am counsel for the respondent in No. 165 and that this petition for rehearing is presented in good faith and not for delay.

LEONARD B. BOUDIN

August 12, 1958.